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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PRO-FOOTBALL, INC., and
DISTRICT OF COLUMBIA ARMORY BOARD, *Petitioners,*

v.

NORMAN F. HECHT, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decisions of the United States Court of Appeals for the District of Columbia Circuit in its cases Nos. 24,446 (April 27, 1971) and 75-1819 (December 20, 1977), both entitled *Hecht, et al.* v. *Pro-Football, Inc., et al.*

OPINIONS BELOW

Petitioners previously filed a petition for a writ of certiorari seeking review of the Court of Appeals' decision in No. 24,446, reported at 444 F.2d 931 (D.C. Cir. 1971), and reproduced as Appendix A to this Petition (pp. 1a-34a, *infra*). That petition was denied by this Court, with Justices Stewart, White, and Marshall

of the opinion that the writ should have been granted. 404 U.S. 1047 (1971).

The initial opinion of the Court of Appeals had reversed a summary judgment entered in favor of petitioners by the United States District Court for the District of Columbia in an opinion reported at 312 F. Supp. 472, and reproduced as Appendix B to this Petition (pp. 35a-44a, *infra*).

On remand following this Court's denial of certiorari, the case was tried to a jury. After a lengthy trial, the jury returned a verdict in favor of petitioners. That verdict was reversed by the Court of Appeals on December 20, 1977, in No. 75-1819. The second opinion of the Court of Appeals is reproduced as Appendix C to this Petition (pp. 45a-76a, *infra*).*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Review of the initial decision of the Court of Appeals is now proper. *See Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

QUESTION PRESENTED

Whether a government agency created by Congress and a private party may be liable for a violation of the Sherman Act based on the terms of a lease for the use of a public facility when the lease was negotiated in good faith and at arm's length, the government agency was acting within express discretionary authority accorded it by Congressional statute, and the terms of the

* References to the Appendices to this Petition are designated "App. —" followed by identification of the specific Appendix and the page number. *E.g.*, App. A 2a.

lease were directed at advancing a valid governmental purpose.

STATUTES INVOLVED

Sections 1, 2 and 3 of the Sherman Act and pertinent provisions of the District of Columbia Stadium Act are set forth in Appendix D to this Petition (pp. 77a-80a, *infra*).

STATEMENT

The Court of Appeals held in its first opinion that the Sherman Act covered a public contract between a government agency created by Congress (the Armory Board) and a private party (the Redskins) for the leasing of a public facility (RFK Stadium). In its second opinion, the Court of Appeals referred to its initial decision, noting that it had concluded "that Congress had evinced no intention" in the stadium legislation to immunize the governmental lease from the Sherman Act. App. C 48a n.5.

In 1957, Congress authorized the Armory Board "to construct, maintain, and operate a stadium" so as "to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility . . . ." District of Columbia Stadium Act § 2, 71 Stat. 619 (2 D.C. Code § 1720).[1] The final enabling statute authorized construction of the stadium on land to be acquired by the Department of the Interior, by condemnation if necessary, with construction to be financed by bonds issued by the Armory Board. D.C. Stadium Act §§ 2-4 (2 D.C. Code §§ 1720-22). The bonds

[1] The Armory Board was established by Congress in 1948. 62 Stat. 339 (2 D.C. Code § 1702).

were to be repayable as to principal within a period "not to exceed thirty years" (2 D.C. Code § 1722) and were to be guaranteed by the United States Treasury.

The Department of the Interior was directed to enter into a contract with the Armory Board for the construction, maintenance, and operation of the stadium. D.C. Stadium Act § 3 (2 D.C. Code § 1721). The Board was given the broadest possible discretion in carrying out its functions under the statute:

> "In order to carry out the purposes of this subchapter, the Board is hereby authorized *without regard to any other provision of law,* but subject to any contract entered into with the Secretary of the Interior under section 2-1721—
>
> "(1) to determine all questions concerning the use of the stadium for the purposes of this subchapter;
>
> ". . .
>
> "(8) to rent or lease from time to time for any of the purposes of this subchapter, all or any part or parts of the stadium including any or all structures, equipment or facilities of the stadium, at such rental values and for such periods of time as the Board shall determine. . . ." D.C. Stadium Act § 5 (2 D.C. Code § 1723) (emphasis supplied).

Thus, under the enabling act, all leasing decisions were left to the judgment and discretion of the Armory Board and the Board was given authority to determine *all* such questions "without regard to *any* other provision of law." *Id.* (emphasis supplied).

In enacting this legislation, Congress gave no indication that it intended the Armory Board to be subject to the Sherman Act in leasing and operating the stadium. Nor did the Armory Board or any party with which it might deal have any reason to believe that the Armory Board was subject to such limitations.

Throughout the period in which Congress was considering the stadium legislation, it was accepted that the success of the stadium venture depended on the Armory Board's securing long-term commitments for the use of the stadium from the two projected principal tenants, the Washington Senators baseball team and the Washington Redskins football team. During hearings and debates, it was made clear to Congress that no stadium would be possible unless the Armory Board was able to obtain a long-term lease from the Redskins.[2]

On December 24, 1959, the Armory Board and the Redskins, after what the Court of Appeals described as "arm's-length, hard bargaining between the two parties for approximately a year and a half," App. A 4a, entered into an agreement under which the Redskins committed themselves to rent the stadium for

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[2] Hearings on S. 3736 and H.R. 12162 before Subcommittees of the Senate and House Committees on the District of Columbia, 85th Cong., 2d Sess. 21 (1958). In later testimony on a 1959 amendment to the Stadium Act, the Armory Board's Chairman, in discussing the lease negotiations with the Washington Senators and the Redskins, noted that "we are desperately anxious to get these contracts in order to be able to float our bond issue." Hearings on H.R. 8392 before Subcommittee No. 2 of the House Committee on the District of Columbia, 86th Cong., 1st Sess. 18-20 (1959). *See also* 104 Cong. Rec. 13787 (1958); 103 Cong. Rec. 6826 (1957). As amended in 1958, the Stadium Act directs that the stadium be "constructed substantially in accordance with the plans for such stadium" contained in a 1958 engineering and economic study. D.C. Stadium Act § 2 (2 D.C. Code § 1720). That study was based on the expectation that the Senators and the Redskins would be the chief sources of revenue.

their home games beginning with the 1961 season and for 29 seasons thereafter. The Board, in turn, agreed not to rent the stadium to another professional football team during the term of the lease.[3]

Without such a reciprocal commitment by the Armory Board, there would have been no lease and no stadium. The action by the Armory Board in agreeing to the exclusive provision, in light of the necessity of obtaining a 30-year lease from the Redskins, clearly served the stadium's interests and clearly fell within the authority granted it by Congress "to determine all questions concerning the use of the stadium" and to lease the stadium "at such rental values and for such periods of time" as it shall determine.

The respondents are individuals who claim to have been promoters pursuing a second professional football franchise for the District of Columbia in a league other than the Redskins' league, the National Football League. Respondents' claims are based solely on the exclusive professional football use terms of the lease between the Armory Board and the Redskins—which respondents assert thwarted their ambitions to establish a team in the District. "There is no contention," the Court of Appeals said, "that there was any fraud, misrepresentation, or overreaching on either side." App. A 4a.

Respondents seek treble damages and injunctive relief against alleged violations of Sections 1, 2 and 3 of the Sherman Act. The sole remaining defendants,

[3] Construction of the stadium, first known simply as D.C. Stadium and since 1968 as Robert F. Kennedy Memorial Stadium, began in 1959. The stadium was opened in 1961.

the petitioners here, are Pro-Football, Inc. (the Redskins) and the Armory Board.[4]

The District Court, in granting petitioners' motion for summary judgment, reasoned that "[n]o violation of the [Sherman] Act can be made out even where there is a restraint of trade or monopolization if it resulted from valid governmental action." App. B 44a. The District Court, relied, *inter alia,* on decisions of this Court, as well as on decisions of the First and Ninth Circuits, holding that activities similar to those involved herein were not subject to challenge under the Sherman Act.

The Court of Appeals reversed the District Court's judgment, ruling that "the validity of the thirty-year lease between the appellees Armory Board and Pro-Football, Inc., must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties." App. A 33a.[5]

[4] The claims against the National Football League, a defendant at the time of the Court of Appeals' first decision, were dismissed with prejudice prior to trial. Plaintiff seeks only injunctive relief as to the Armory Board, although the Board and the Redskins are charged as joint tortfeasors with violating the Sherman Act.

[5] To the extent that the Court of Appeals relied upon a construction of the Stadium Act rather than the Sherman Act, the Court thoroughly misconstrued that Act. Thus, the Court read a provision of the Stadium Act that required competitive bidding on property and equipment contracts in excess of $3,000 as expressing "Congress' concern to preserve the competitive spirit in larger contract offerings. . . ." App. A 29a. But Congress manifested no such pro-competition attitude with respect to large contracts as the Court of Appeals attributed to it. The Armory Board's largest single contract would be the contract for construction of the stadium, and another section of the Act specifically authorized the Board to provide for the construction of the stadium "by such means as it determines will most effectively carry out this [Act]

The fact record necessary for this Court's review is fully developed. This case has twice been remanded by the Court of Appeals, the second remand following a jury trial in which the government agency's reasons for entering into the lease agreement were thoroughly examined. If further proceedings in the District Court lead to another appeal, such an appeal is likely to result from the continuing confusion that the unprecedented "governmental act" ruling of the Court of Appeals has engendered.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of Federal antitrust law that has not been, but should be, settled by this Court and has decided that question in a manner that can have a major impact on the contracting practices of all government agencies, state, local, or Federal. In reviewing an action of a government agency under a Congressional statute prescribing no antitrust limitations on the agency's conduct, the Court ruled that the agency's contracting practices are subject to the same antitrust standards as are routinely applied to contracts between private parties. The Court's ruling is unique, because the government agency to which these standards were applied was established by the very legislative body that enacted the Sherman Act—the Congress of the United States.

(including, but not limited to, a negotiated contract)." D.C. Stadium Act § 2 (2 D.C. Code § 1720). Indeed, the limited requirement of competitive bidding on property and equipment contracts plainly suggests that other contracts, including leases, did not have to be let on a competitive basis.

Heretofore, it has been accepted that the contracting practices of government agencies created by Congress are not subject to the standards of the Sherman Act. This acceptance has proceeded on the premise that the Sherman Act and other antitrust laws were never intended to be applicable to the actions of Federal agencies unless Congress specifically so declared. That understanding has now been reversed by the Court of Appeals, with the Court ruling that antitrust law principles developed in private business contexts apply equally to the contracting actions of Congressionally-created agencies unless Congress has specifically provided to the contrary.

This issue was not addressed in *Parker* v. *Brown,* 317 U.S. 341 (1943), which required a reconciliation of the Sherman Act with a state regulatory enactment that directed private conduct in conflict with the Sherman Act. Nor is the present issue resolved by this Court's rulings in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), or in *Bates* v. *State Bar of Arizona,* 97 S. Ct. 2691 (1977), which dealt with the questions of whether essentially private conduct undertaken with the approval, acquiescence, or at the direction of state legislative, regulatory, or judicial authority is entitled to antitrust immunity. Nor will the current issue be resolved by this Court's decision in *City of Lafayette* v. *Louisiana Power & Light Co.,* No. 76-864, currently pending before this Court, since that case is concerned with the actions of a municipality acting under authority of state law.

The decision of the Court of Appeals is without precedent. It is unsupported by the language or history of the Sherman Act or by decisions of this Court. It

stands for the proposition that *per se* rules, tie-in and reciprocity principles, exclusive dealing and maximum pricing concepts, and all other limiting antitrust principles are equally applicable to Federal agency contracts, regardless of the government agency's objectives and interests in entering into contracts on such terms. If given general effect, the Court's ruling would bear heavily upon the operations of Congressionally-created agencies and other units of government that perform their public functions in whole or in part through contracting with private firms and that enter into contracts with interests and objectives differing broadly from those influencing private business dealings.

The decision below is also in conflict with the decisions of other Courts of Appeals that have rejected a comparable antitrust law application even where state and municipal agencies were concerned. *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969); *Padgett* v. *Louisville & Jefferson County Air Board,* 492 F.2d 1258 (6th Cir. 1974). More broadly, the decision below misconstrues and rejects the decisions of this Court delineating the role of the antitrust laws in relation to valid governmental action and to private action claimed to be immunized by governmental action.

This Court has recognized the need for clarification of its "governmental act" decisions in state and municipal agency contexts. *E.g., Cantor*; *City of Lafayette.* It is equally important that it do so in a context where government agencies acting ursuant to Congressional authorization have entered into contracts

claimed to be vulnerable under private antitrust law principles.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S CONTROLLING DECISIONS

The Court of Appeals' attempted accommodation of the Sherman Act and the conflicting Stadium Act was grounded on two essential lines of analysis—each erroneous. First, the Court of Appeals improperly read *Parker* v. *Brown,* 317 U.S. 341 (1943). Second, it erroneously assumed that the Sherman Act applies to the public contracts of Congressionally-created agencies unless Congress expressly states the contrary, and the Court misinterpreted this Court's decisions regarding the Sherman Act's application to private business conduct that is subject to regulation by a Federal agency.

The court below read *Parker* v. *Brown* as holding that the California agricultural statute was not subject to the Sherman Act because the state's regulatory scheme was consistent with the Federal Agricultural Adjustment Act. App. A 10a. It thus concluded that *Parker* validated California's exercise of sovereign state power in regulating state agricultural matters not because governmental action is beyond the scope of the Sherman Act, but simply because the state action took a form that Congress had previously adopted in establishing Federal agricultural policy. On this basis, the Court of Appeals explicitly rejected what it characterized as a "theory, that where there can be established unequivocal state action the antitrust laws do not apply." App. A 15a.

But this Court's opinion in *Parker* and recent discussions of *Parker* demonstrate the error in the Court

of Appeals' analysis. In considering the Sherman Act issue in *Parker,* this Court did not mention the Federal Agricultural Adjustment Act—much less rest its decision on any similarity between that Act and the California agricultural statute. 317 U.S. at 350-52. Further, the Court of Appeals' reading of *Parker* finds no support in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 788-92 (1975), or in any of the several opinions in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), which analyzed *Parker* in minute detail. *See Cantor,* 428 U.S. at 587-92, 603-05, 615-21.

The Court of Appeals was equally in error in presuming that the Sherman Act fully applies to the public contracts of governmental agencies "in the absence of unequivocal exemption therefrom, either by specific statutory language or by a purpose to enforce other policies of equal or greater importance. . . ." App. A 28a.[6] The Court was also wide of the mark in relying on decisions of this Court and lower Federal courts that have considered whether private conduct in a Federally regulated industry is immunized from the antitrust laws. App. A 22a-27a. In those cases, the challenged private conduct did not involve public contracts by governmental agencies designed to serve public purposes. Instead, those cases involved private activity unquestionably subject to the Sherman Act in

[6] The court below articulated a quite open-ended, six-part balancing test for determining whether governmental action should be "immune" from the Federal antitrust laws. App. A 9a. That test has been criticized by both the Ninth Circuit in State of New Mexico v. American Petrofina, Inc., 501 F.2d 363, 371 (1974), and by commentators as inconsistent with *Parker* v. *Brown* and on other grounds. *See, e.g.,* Comment, The State Action Exemption In Antitrust: From Parker v. Brown to Cantor v. Detroit Edison Co., 1977 DUKE L.J. 871, 896-97.

the absence of a regulatory overlay.[7] Unlike here, the issues in such cases related to the presence or absence of express authority in the regulatory agency to confer immunity and to the private antitrust defendants' ability to demonstrate that the objectives of a Federal regulatory scheme require an "implied repeal" of the antitrust laws.

This case is, however, fundamentally different. The issue is not one of immunity for private conduct, but of whether a government agency can itself be liable under the Sherman Act for taking action within its discretion under its enabling statute and directed at a valid governmental purpose. As stated by the First Circuit, this issue does not involve "any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place." *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 56 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966). If the Sherman Act does not extend to such governmental action, surely that Act cannot indirectly be brought to bear by applying it to a private party that enters into a valid contract with a government agency. *Cf. Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 730 (1965) (Goldberg, J., concurring)

Prior to the decision of the court below, the general understanding had been that specific Congressional action would be required to subject public contracts to the Sherman Act—and the prevailing authority made that general understanding explicit as to the contracts of state governmental units. *E.W. Wiggins Airways, Inc.*

[7] Recent illustrations of the class of cases erroneously invoked by the Court of Appeals are Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 691 (1975) and United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 719, 729-30 (1975).

v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969).[8] As to the public contracts of Congressionally-created agencies, the decision of the court below continues to stand alone.[9]

Petitioners further submit that the Court of Appeals' decision is inconsistent with the three pertinent, recent decisions of this Court—although we recognize that each of these decisions dealt with state governmental action. *Bates* v. *State Bar of Arizona,* —— U.S. ——, 97 S. Ct. 2691 (1977); *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); and *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975).

In *Bates,* this Court held the Arizona Supreme Court's regulation of attorney advertising to be outside the scope of the Sherman Act, emphasizing that

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[8] *See* pp. 22-24, *infra,* for additional discussion of these decisions.

[9] Under the Court of Appeals' six-part balancing test, App. A 9a, the contracts of many Congressionally-created agencies could well be subject to the antitrust laws. As to contracts of the Department of Defense and NASA, for example, the Armed Services Procurement Act, granting these agencies their contracting authority, specifies the laws that are *inapplicable* to agency contracts without including the antitrust laws, 10 U.S.C. § 2314, and competitive principles were intended to control the great bulk of contracting under that Act. S. Rep. No. 571, 80th Cong., 1st Sess. 1-6, 12-13, 15-16 (1947); H.R. Rep. No. 109, 80th Cong., 1st Sess. 3-6 (1947). In denying a protest of a contract award by the Air Force, the Comptroller General has broadly stated that Federal government contracting officers are not "required to consider the antitrust laws in the execution of their responsibilities . . ." and that "the imposition of such a requirement upon the contracting officers of the Government would impose an *intolerable burden and inordinately delay the procurement process.*" Comp. Gen. B-176223 at 161, 166-67 (Sept. 25, 1972) (emphasis supplied).

the antitrust claims were "against the State" and that the State had a direct and independent public interest in the challenged regulations. 97 S. Ct. at 2697-98.

Goldfarb and *Cantor,* unlike *Bates,* considered the application of the Sherman Act to private party conduct taken in conjunction with differing measures of state action. In *Goldfarb,* the Court held that neither the Virginia State Bar, a state agency "for some limited purposes," nor the county bar, a private organization, was entitled to a Sherman Act exemption because they had "voluntarily joined in what is essentially a private anticompetitive activity . . . ." 421 U.S. at 791-92. While *Goldfarb* did not rule on the application of the Sherman Act to a government contract, its analysis of the pertinent considerations does not support the Court of Appeals' rationale here.

Similarly, while *Cantor* did not directly deal with the present issue, the several opinions there strongly suggest that a compelling, if not clearcut, case for the inapplicability of the Sherman Act would exist where, as in the present suit, government officials are sued and the challenged action directly involves a valid exercise of governmental authority to serve a public purpose. 428 U.S. at 585-92, 600-01, 615-17. As Mr. Justice Blackmun later stated for a unanimous Court in *Bates, Cantor* "would have been an entirely different case if the claim had been directed against a public official or public agency rather than against a private party." 97 S. Ct. at 2697. If that is correct, the decision of the court below cannot be permitted to stand.[10]

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[10] City of Lafayette v. Louisiana Power & Light Co., No. 76-864, October Term, 1976, presents the related question of whether Congress intended the Federal antitrust laws to apply to the actions of

Nor can the Court of Appeals' decision be reconciled with this Court's decisions that have interpreted the term "person" in the Sherman Act in the context of governmental entities as antitrust plaintiffs.[11] *United States* v. *Cooper Corp.*, 312 U.S. 600, 614 (1941) (the United States is not a "person" [plaintiff] under Section 7); *Georgia* v. *Evans*, 316 U.S. 159, 162 (1942) (a state is a "person" [plaintiff] under the Sherman Act); *Pfizer* v. *Government of India*, —— U.S. ——, 98 S. Ct. 584, 590 (1978) (a foreign sovereign is a "person" [plaintiff] under the Clayton

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state governmental units. The amended antitrust counterclaim against the two cities in that action alleged that the cities had violated the antitrust laws in the operation of their municipal electric utility systems by, among other things, entering into various covenants and contracts with bondholders, customers, and others that had anticompetitive effects. If this Court reverses the Fifth Circuit in *City of Lafayette* and holds that the challenged conduct of the cities is not subject to the Sherman Act, it may be appropriate for this Court to vacate the decision of the Court of Appeals below and to remand the present suit for reconsideration in light of the decision in *City of Lafayette*. On the other hand, in view of the unique, Federal aspects of the present case, an affirmance of the Fifth Circuit in *City of Lafayette* ought not preclude review of this case.

[11] The Sherman Act prohibits unlawful conduct by "persons." Section 2 applies by its terms to "every person" who shall do certain acts either independently or with "any other person or persons." App. D 77a. Sections 1, 2 and 3, in designating those to be criminally liable, refer to "every person" who shall engage in the prohibited conduct. *Id.* And Section 8 defines the term "person" to include corporations and associations existing under the laws of the United States, Territories, any State, or any foreign country. 15 U.S.C. § 7.

Respondents' Count 1 is based upon Sections 1 and 3 of the Sherman Act (the latter section dealing specifically with acts within the District of Columbia). Respondents' Count 2 is based upon Sections 2 and 3 of the Act.

Act). These decisions establish that the term "person" is not a word of art with a uniformly fixed meaning and that the scope of the Sherman Act is to be resolved "in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction." *Cooper*, 312 U.S. at 605.

The Court of Appeals effectively held that a Congressionally-created government agency was a "person" fully subject to the Sherman Act in the same manner as any private business, but it did so without considering any of the textual and policy factors that this Court found dispositive in *Cooper*, 312 U.S. at 606-08, in *Georgia* v. *Evans*, 316 U.S. at 161-62, and in *Pfizer*, 98 S. Ct. at 590.[12] Further, the interpretation of the court below conflicts with *Cooper*, which declined to read the term "person" as encompassing the United States, in part because such a reading would make the United States "liable to suit for treble damages." 312 U.S. at 606.[13]

The Court of Appeals' failure of analysis is unusually serious in view of the District of Columbia's unique position in our nation's governmental structure, *see District of Columbia* v. *Murphy*, 314 U.S 441, 452

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[12] The Court, for example, gave no consideration to the possible criminal liability of District of Columbia officials, to the potential of joint tortfeasor liability, to the effects of treble damage liability on the governmental treasury, to the effects that a rescission of the stadium lease might have on government interests, and to other such consequences.

[13] In *Cantor*, it was noted that the claim of state violation of the Sherman Act was first raised in *Parker* v. *Brown* after this Court had held in *Georgia* v. *Evans*, 316 U.S. at 162, that the State of Georgia was a "person" within the meaning of Section 7 of the Sherman Act. 428 U.S. at 586-87, 591.

(1941), and of the Sherman Act's specific provisions applicable to commerce within the District, 15 U.S.C. § 3, App. D 77a-78a. Under the Constitution, Congress exercises "plenary power over the District of Columbia and its officers." *District of Columbia* v. *Carter,* 409 U.S. 418, 429 (1973). When Congress enacted the Sherman Act in 1890, the governance of the District of Columbia was a direct responsibility of the Congress and the Federal government itself.

The Court of Appeals' holding that the Sherman Act applies to a Congressionally-created agency of the District of Columbia government is thus tantamount to a conclusion that Congress intended the Sherman Act to cover not only private restraints of trade in the District but any actions of the Congress itself that might restrain trade in the District. But the Court of Appeals, in so holding, gave no consideration to any aspect of the Sherman Act's terms, history, or purposes as they might relate to the District. Petitioners submit that if Congress intended to include within the Sherman Act conduct taken in governing the District of Columbia, " 'the ordinary dignities of speech would have led' to its mention by name." *Cooper,* 312 U.S. at 606.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THE FIRST, SIXTH, AND NINTH CIRCUITS

The question of the applicability of the Sherman Act to government contracts between non-Federal government agencies and private parties has been considered by six Courts of Appeals as well as by a number of lower Federal courts. As already noted, the decision of the court below is the only ruling, so far as petitioners are aware, by any Court of Appeals regarding the

applicability of the Sherman Act to a public contract of a Congressionally-created agency.[14]

Major confusion has characterized the decisions of the Courts of Appeals regarding public contracts and the Sherman Act. This has resulted from widely differing interpretations of *Parker* v. *Brown,* 317 U.S. 341 (1943), from uncertainty as to the bearing of this Court's *Goldfarb* and *Cantor* decisions on the public contracts question, and in some measure from confusion as to the merits of the analysis of the Court of Appeals below.

The conflict is square between the decision below and the decision of the Court of Appeals for the First Circuit in *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966), the decision of the Court of Appeals for the Sixth Circuit in *Padgett* v. *Louisville & Jefferson County Air Board,* 492 F.2d 1258 (6th Cir. 1974), and the decision of the Ninth Circuit in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969). In addition, the Ninth Circuit, in holding the Sherman Act inapplicable to alleged anticompetitive conduct of the State of New Mexico and several of its subdivisions, has noted that the Court of Appeals below "did not limit its reasoning to cases involving Federal [governmental] ac-

[14] *Cf.* Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), where the court expressed the view that the Sherman Act was applicable to a trade agreement between foreign steel companies made "as a result of negotiations initiated by the Secretary of State at the direction of the President" (*id.* at 321) with apparent assurances of Sherman Act immunity. However, the Sherman Act issue was then mooted. *See* Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975).

tion," concluding that the Ninth Circuit's view of governmental immunity "is inconsistent with the rationale of *Hecht.*" *State of New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 371 (9th Cir. 1974).

On the other hand, the Courts of Appeals for the Third, Fourth, and Seventh Circuits have applied the Sherman Act to state or local governmental action in a manner similar to the decision below. *See Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975); *City of Fairfax* v. *Fairfax Hospital Association*, —— F.2d ——, 1977-2 Trade Cas. ¶ 61,598 (4th Cir. 1977); *Kurek* v. *Pleasure Driveway & Park District*, 557 F.2d 580 (7th Cir. 1977).

The nature of these conflicts and the importance of the issue to which they relate can best be understood by consideration of the following background:

The public contract is an increasingly important instrument of government at all levels—Federal, state and local. Besides its obvious utility in procuring a broad range of goods and services,[15] the government contract is a vital tool of public policy. Through the award of government contracts and enforcement of their terms, for example, the Federal government acts to alleviate unemployment in designated sections of the country, to ensure equal employment opportunity and fair labor practices, to protect the environment, to aid small businesses, and to assist domestic industries in competition with foreign concerns.

[15] For example, in fiscal year 1977, the Department of Defense alone entered into 217,566 procurement actions (awards of or changes in prime contracts) of $10,000 or over. Military prime contracts awarded after receipt of two or more responsive offers totaled over $18,564,000,000. Office of the Secretary of Defense, Military Prime Contract Awards, October 1976-September 1977 at Table 9, Table 16 (1978, in press).

Many public contracts (and their underlying policy-implementation purposes) would be jeopardized by application of the antitrust laws in the manner urged by the Court of Appeals. Governments often seek and obtain price concessions that are unavailable to other purchasers of goods or services.[16] Governments sometimes enter into price-fixing agreements,[17] tying arrangements,[18] and requirements contracts.[19] Government contracts, like that between petitioners, frequently provide for grants of exclusive rights to private parties in return for reciprocal benefits to the government.[20] And governments often debar private parties from contracting or otherwise dealing with government agencies.[21]

The inapplicability of the Sherman Act to public contracts—as held by the First, Sixth, and Ninth Circuits but rejected by the court below—is an aspect of the general rule that the antitrust laws are not appli-

[16] The Robinson-Patman Act has been ruled inapplicable to contracts of the Federal government. Comp. Gen. B-178928 (July 17, 1973); 38 Op. Att'y Gen. 539 (1936).

[17] *See* State of New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974); Ventura Port District v. Taxpayers, 53 Cal. 2d 227, 233-35, 347 P.2d 305, 310-11 (1959).

[18] *See* City of Lafayette v. Louisiana Power & Light Co., No. 76-864, Oct. Term, 1976.

[19] *Compare* Kalvar Corporation, Inc. v. United States, 543 F.2d 1298 (Ct. Cl. 1976), *with* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[20] Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Panama City v. Seven Seas Restaurant, Inc., 180 So. 2d 190 (Fla. App. 1965); Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority, 81 Ariz. 80, 299 P.2d 1071 (1956).

[21] *Compare* Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), *with* Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

cable to valid government acts. *Parker* v. *Brown*, 317 U.S. 341 (1943).[22] *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). In *E.W. Wiggins Airways, Inc.*, for example, the Port Authority had contracted with a private company for the latter to become the sole maintenance service operator at Logan Airport in Boston. An antitrust suit was brought by one of the former service operators, naming the Port Authority and the new operator as defendants. In holding that no suit lay, the First Circuit said:

> "By statute [the Authority] has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. It also has wide powers, many of which are bestowed only upon instrumentalities of government.
>
> * * *
>
> "In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with [the chosen fixed base operator]. It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage

[22] In *Parker*, this Court, in making the point that it was dealing with sovereign governmental action, said that "the state . . . made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly. . . ." 317 U.S. at 352. This language has not been taken, even by the court below which quoted it, as an indication that every public contract is to be scrutinized to determine whether it imposes an illegal restraint or otherwise violates the antitrust laws. At the very most, *Parker* leaves open the question posed by this case, which should now be answered.

> the airport and establish rules and regulations for its use . . . . What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action." 362 F.2d at 55.

As for the defendants other than the Port Authority, the court held that in the circumstances "it would be an unreasonable restriction on [the Authority's] freedom to hold that the other defendants acted illegally in having aided it." 362 F.2d at 56.[23]

To the same effect are *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), and *Padgett* v. *Louisville & Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974). *See also Trans*

[23] The Court of Appeals below did not distinguish *Wiggins* on any tenable ground. Indeed, the Court acknowledged that the Armory Board could construct, maintain, and operate the RFK Stadium "as straight-forward federal governmental action" without being subject to antitrust challenge. App. A 17a. But the Court stated that Congress had not authorized the Board "to own and operate the only professional football team" to play in the Stadium. *Id.* To be sure, it is not at all clear how the challenged lease transformed the Board from operator of the Stadium to owner of the Redskins. Beyond that, however, the Court seems simply to have indulged in the outmoded distinction between "governmental" and "proprietary" functions—based upon what this Court has characterized as "untenable criteria. . . ." New York v. United States, 326 U.S. 572, 583, 586, 591 (1946). There is very little today that governmental bodies cannot directly do—construct housing developments, operate factories, lease warehouses, or provide public entertainment. In any event, the Court's attempted distinction is beside the point. The Armory Board's contract with the Redskins was pursuant to its express statutory authority to operate the stadium. It was a governmental act based upon the Board's decision concerning the use of the stadium, a decision that Congress made the sole responsibility of the Board. The decision of the Massachusetts Port Authority to contract for airport services in *Wiggins* was an identical exercise of its power under its governing statute.

World Associates, Inc. v. *City and County of Denver,* 1974-2 Trade Cas. ¶ 75,293 (D. Colo. 1974); *Continental Bus System, Inc.* v. *City of Dallas,* 386 F. Supp. 359 (N.D. Tex. 1974) (private bus company was not a defendant in the action).

The contrary view—and the need for clarification of the applicable principles—is illustrated by the Fourth Circuit's decision in *City of Fairfax* v. *Fairfax Hospital Association,* —— F.2d ——, 1977-2 Trade Cas. ¶ 61,598 (4th Cir. 1977). That suit involved an antitrust challenge of a proposed lease between the Industrial Development Authority of the County of Fairfax, Virginia ("an agency of the Commonwealth of Virginia") and a privately owned and operated community hospital. Reversing the District Court's judgment that the proposed lease was not subject to the Sherman Act, the Fourth Circuit—in two separate opinions and over a dissent—concluded that the County's Industrial Development Authority was not necessarily beyond the scope of the Sherman Act. *Id.* at p. 72,480. The difficulty of applying *Parker* v. *Brown,* as elaborated by *Goldfarb* and *Cantor,* to the many variants of public contracting actions is evident in the opinions of both Judge Wyzanski and Judge Widener, as well as in the dissenting opinion of Judge Hall, who concluded that the majority's view of the "state action" exemption was interpreted "much too narrowly . . . ." *Id.* at p. 72,483.

The need for clarification is similarly reflected in *Murdock* v. *City of Jacksonville,* 361 F. Supp. 1083 (M.D. Ala. 1973), which also involved a public agency's lease for the use of a public facility. In *Murdock,* the court ruled that the municipality and its officials were entitled to the full scope of "immunity" under *Parker*

because leases of city property (the coliseum) were specifically authorized by the State legislature and the exclusivity clause was inserted after a "conscious determination by the City Council that an exclusive lease provided the greatest advantages to the City." 361 F. Supp. at 1093. But in reliance on the earlier decision of the Court of Appeals in the present case, the *Murdock* court simultaneously held: "Clearly the immunity enjoyed by the City is not available to the private corporate entity" that had leased the public facility. 361 F. Supp. at 1093. *Compare Murdock with Duke & Company, Inc.* v. *Foerster,* 521 F.2d 1277 (3d Cir. 1975), where the Sherman Act was held applicable to governmental as well as private parties in a suit involving concession arrangements at public facilities.[24]

Apart from the Court of Appeals' holding that the Sherman Act extends to government contracts, there is no warrant for concluding that contracts of government agencies "must be tested in accordance with the United States antitrust laws *as usually applied to contracts between private parties.*" App. A 33a (emphasis supplied).[25] The antitrust laws rest on the premise that private commercial interests and the public interest do not always coincide, thus necessitating public interest

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[24] In accord with the Third Circuit's decision are Heath v. Aspen Skiing Corp., 1971 Trade Cas. ¶ 73,560 (D. Colo. 1971); Allegheny Uniforms v. Howard Uniform Co., 384 F. Supp. 460, 463 (W.D. Pa. 1974); and Kurek v. Pleasure Driveway & Park District, 557 F.2d 580, 589 (7th Cir. 1977).

[25] Nor can any significance be attached to the fact that the opposite party to a governmental agency contract is a private business enterprise; an antitrust limitation imposed on the contract privileges of a private party to a government contract is an equal limitation on the government agency's authority. *Wiggins,* 352 F.2d at 56.

controls over private business activities and contractual relations. Antitrust law also adheres to the premise that "competition," in the private sphere, is paramount, *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 500 (1940), even to the point where successful business operations can no longer be conducted. Under the antitrust laws, as usually applied to private parties, many forms of business conduct are outlawed as *per se* offenses without even an opportunity for inquiry into their purposes, justification, or motivating interests. But these standards have been established entirely on the basis of the courts' extensive experience with certain business relationships in the private sector. *See White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963). And these standards, as developed and applied to private businesses, derive from the notion that individual economic freedom in the free-enterprise system should not be foreclosed in any sector of the economy by "private citizens or groups. . . ." *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 610 (1972).

Governments, on the other hand, frequently enter the marketplace only when these premises have been found inadequate and in need of modification. It is, moreover, implicit in the authority given government agencies dealing in the marketplace that their interests, objectives, and motivations are distinct from those of private parties. Such agencies, by their nature, are charged with a responsibility for serving the public interest. Thus, when a government agency exercises its statutory discretion in carrying out its assigned responsibilities, the premises of ordinary antitrust standards are wholly lacking.

As a consequence, if the antitrust laws are to be applied to government agency contract dealings, it will be necessary to develop an independent set of antitrust principles broadly at variance with those now applied to transactions between private parties. If this is not done, the Court of Appeals' ruling that contracts between Congressionally-created government agencies and private parties are equally subject to the antitrust laws will improperly handicap many public agencies both in fulfilling their assigned responsibilities and in serving the public interest.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted to review the decisions of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,446

NORMAN F. HECHT,
HARRY KAGAN,
MARC A. MILLER, APPELLANTS
WASHINGTON FEDERALS INC., ET AL.

v.

PRO-FOOTBALL, INC., ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided April 27, 1971

• • •

Before WILKEY, *Circuit Judge*, VAN PELT,* *Senior United States District Judge* for the District of Nebraska, and GIGNOUX,** *United States District Judge* for the District of Maine.

WILKEY, *Circuit Judge*: Appellants brought this action under §§ 1, 2, and 3 of the Sherman Act, alleging that a restrictive covenant in the lease between appellee Pro-Football, Inc., and appellee District of Columbia Armory Board, which prohibits the use of Robert F. Kennedy Stadium by any professional football team other than the Washington Redskins for a period of thirty years, violates the prohibition against contracts in restraint of trade.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1964).

** Sitting by designation pursuant to 28 U.S.C. § 292(c) (1964).

Appellant-plaintiffs are three local businessmen, who over a period of time sought to obtain either an American or Continental Football League franchise for Washington, D.C. The appellee-defendants are Pro-Football, Inc., the corporate name of the Washington Redskins, the National Football League, an unincorporated association of owners of professional football teams of which appellee Pro-Football, Inc., is a member, and the District of Columbia Armory Board, an unincorporated instrumentality of the District of Columbia which operates Robert F. Kennedy stadium.

Count 1 of appellants' complaint alleges that the restrictive covenant in the Redskins' lease on Kennedy Stadium constitutes a contract in restraint of the business of professional football in the District of Columbia, thus violating §§ 1 and 3 of the Sherman Act. Count 2 alleges that the Redskins are engaged in an attempt to monopolize and have monopolized the business of professional football in violation of §§ 2 and 3. Count 3 joins the National Football League and two individuals not parties to this appeal with the Redskins in an alleged unlawful combination and conspiracy to restrain and monopolize the business of professional football in violation of §§ 1, 2, and 3 of the Sherman Act.

On cross-motions for summary judgment, the U.S. District Judge granted the appellee-defendants' motions for summary judgment on all three counts, reasoning:

> Thus, the leasing of the stadium was pursuant to the mandate of the Act and was governmental action. As such it was . . . exempt from the antitrust laws. . . . No violation of the Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 136 (1961).

In the manner the cross-motions for summary judgment were submitted to the District Court, this was the only

issue before it. The District Judge did not purport to decide, and indicated that before doing so he would need to hear evidence, whether the restrictive covenant in the lease *does* constitute a contract in restraint of the business of professional football, or whether this restrictive covenant effectuates any monopoly of professional football by the Redskins, or whether the restrictive covenant furthers the conspiracy to restrain and monopolize the business of professional football as alleged.

Nor do we decide these issues on this appeal. For reasons set forth below, we conclude that the District Judge erred in his holding recited above, and that the cause must be remanded for trial upon the issues left undecided by the grant of appellee-defendants' motion for summary judgment.

I. *The Statute and the Lease*

The Robert F. Kennedy Stadium was constructed pursuant to an Act of Congress of 1957, with amendments in 1958 and 1959.[1] By this statute the Armory Board was authorized to construct, maintain and operate the stadium "in order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility."[2] The Secretary of the Interior was authorized to acquire "by gift, purchase, condemnation, or otherwise," the property and to contract with the Armory Board for the construction, maintenance and operation of the stadium for a term not exceeding thirty years.[3] Another section of the statute, strongly relied upon by the appellees here, provided:

> In order to carry out the purposes of this subchapter, the Board is hereby authorized *without regard to any*

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[1] 2 D.C. Code § 1720 *et seq.*

[2] 2 D.C. Code § 1720.

[3] 2 D.C. Code § 1721.

other provision of law, but subject to any contract entered into with the Secretary of the Interior under section 2-1721 [for the use of the Stadium site]—

(1) *to determine all questions concerning the use of the stadium* for the purposes of this subchapter;

• • • •

(8) *to rent or lease* from time to time for any of the purposes of this sub-chapter, *all or any part or parts of the stadium* including any or all structures, equipment or facilities of the stadium, at such rental values and for *such periods of time as the Board shall determine; . . .*[4] (Emphasis supplied by appellees in brief.)

Pursuant to this statute the stadium was constructed and the lease between the Armory Board and the Redskins entered into 24 December 1959 for a term of thirty years, commencing with the football season in 1961. There is no contention made here that there was any fraud, misrepresentation, or overreaching on either side. There was arm's-length, hard bargaining between the two parties for approximately a year and a half before the lease agreement was signed. The restrictive covenant complained of reads:

> [T]he Lessor shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period exclusive of such specific dates referred to herein for any purpose or purposes, (except provided in subsection (a) of this Paragraph IX), including (but not limited to) school, college or other amateur or professional baseball, football and basketball games and, also, for such other use or purpose as the Lessor may determine, *provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins.* (Emphasis supplied.)

[4] 2 D.C. Code § 1723.

It is alleged and not contradicted that Kennedy Stadium is in fact the only suitable place for professional football in the District of Columbia. It is undisputed that it has many unique advantages. In 1965, appellants on behalf of themselves and others with a financial interest in their venture submitted an offer to the Armory Board to lease Kennedy Stadium on those Sundays, Friday nights, and Saturdays, and other times the stadium was not being used by the Redskins, for a minimum guaranteed rent or the same percentage of the gross receipts paid by the Redskins. The Armory Board replied that under the terms of the lease with the Redskins it was prohibited from leasing the stadium to them or to anyone for the use of another professional football team. After reiterations of the offer, the Armory Board continued to adhere to its position that the restrictive covenant of the lease prohibited it from leasing Kennedy Stadium to another football team without the consent of the Redskins.[5] Thus, appellants were not able to secure the use of the stadium at any time during the year for professional football purposes, and they allege that for this reason their efforts to obtain franchises in the two professional football leagues fell through.

The District Court emphasized in its opinion that the legislative history of the Stadium Act shows that "there would have been no stadium unless a long-term lease could be negotiated by the Armory Board with the Redskins." The District Court also placed great emphasis on the fact that the Secretary of Interior's contract with the Armory Board for the construction, maintenance, and operation of the stadium was for a term of not more than thirty

[5] On 7 October 1965 the Special Assistant to the Solicitor of the Department of Interior furnished the Solicitor's legal opinion to the Armory Board, concluding that the restrictive covenant in the lease was in violation of the antitrust laws. On the basis of a contrary opinion from a private law firm, however, the Board adhered to its position that the lease's restrictive clause was binding and enforceable.

years, and that Congress authorized the Armory Board to issue bonds for the construction of the stadium with the principal payable not later than thirty years from the date of issuance.

In the District Court's opinion all of this added up to governmental action which created an immunity from the normal application of the antitrust laws. We can agree that most of this was governmental action, that governmental action was sensibly intermeshed and coordinated over the same time span, and that there might have been no stadium unless there could have been a long-term lease with the Redskins professional football team (as well as the Washington professional baseball team), but there is no finding by the District Court that there would have been no lease with the Redskins without the restrictive covenant complained of and that Congress knew this, nor is there any finding that Congress directly authorized such a restrictive covenant.

II. *The Applicability of the United States Antitrust Laws to "Valid Governmental Action"*

The rationale of the trial court and the theory of the appellees in sustaining its decision is set forth as "the execution of the . . . lease . . . constituted valid governmental action which is immune from application of the antitrust laws." In support of this appellees state, "The key, undisputed fact is that the Armory Board is a governmental agency." And we are cautioned not to "overlook the fact that, in leasing the Stadium, the Armory Board acted pursuant to an Act of Congress." In conclusion, after review of the pertinent authorities, appellees deduce the "rule that where direct governmental action, as distinct from private conduct, has caused the alleged injury to a plaintiff, the provisions of the federal antitrust laws are inapplicable, . . ." and "the action of the Armory Board in entering into the Stadium lease with the Redskins was a governmental act which is immune from application of the antitrust laws."

After a study of the rationale back of the decided cases in this area of antitrust law, we consider that the issue, the facts considered most relevant by appellees, and the rule derived by appellees is a much too talismanic approach where scrupulous distinctions are called for. As was said earlier this year by Judge Goldberg in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Co. of America,* "[t]he instant case involve[s] state participation. That proposition, however, only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject 'the facile conclusion that action by any public official automatically confers exemption.' *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, . . . 1 Cir. 1970, 424 F.2d 25, 30."[6] Like Circuit

[6] [1971 Trade Cases ¶ 73,422], Nos. 28,763, 29,487 (5th Cir., 5 Jan. 1971). Though *Woods* never referred to *Alabama Power Co.* v. *Alabama Electric Cooperative,* 394 F.2d 672 (5th Cir. 1968), it is obvious that its rationale, based as it is on the proposition that "not every governmental act . . . points a path to an antitrust shelter," represents a significant shift in the Fifth Circuit away from the views of the majority in *Alabama Power,* which was based upon the flat assertion that "it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action," *id.,* at 675, towards the rationale of Judge Godbold's dissent in that case. In language expressive of the approach we take here, Judge Godbold stated:

> Congress can, and in numerous instances by express legislation has, subordinated the national policies reflected in the antitrust laws so as to authorize government officials to perform acts or pursue policies without regard to the antitrust laws. . . . The courts carefully have limited these expressly conferred immunities to the scope defined in each instance by Congress so as to avoid pro tanto repeal of the antitrust laws. *Id.,* at 680.

And,

> The cases do not support a proposition of general governmental immunity. If there is such a principle Congress has been proceeding for a long time under a misapprehension in providing for government officers, and those with whom they deal, exemptions which are specific in nature and varying in scope. *Id.,* at 685.

Judge Coffin in *Paddock Pool, supra,* "[w]e are particularly reluctant to rely on verbal formulae to solve problems of antitrust liability."[7]

Although the Sherman Act has been characterized as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,"[8] it is fundamental that neither the Sherman Act nor any other antitrust statute restricts the United States Government in directing action in complete contradiction to antitrust policy, because after all the Sherman Act and related antitrust statutes are only statutes, not constitutional charters. But, the basic philosophy of our antitrust policy has been so long established, is of such recognized economic importance, and has assumed in the statutory scheme of things such high dignity[9] that a contrary congressional intent or "immunity from antitrust laws 'is not lightly implied.'"[10]

Anticipating a bit our conclusions below, we suggest that it may be inaccurate and confusing to speak of "valid governmental action which is immune from application of the antitrust laws." Rather, the proper inquiry would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, where state action is concerned (since states are not named in the Sherman Act and antitrust laws are directed at suppression of anticompetitive business action), the inquiry should be to what extent is the state action permissible as not con-

[7] 424 F.2d 25, 29 (1st Cir. 1970).

[8] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

[9] *See, e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963), stressing "the indispensable role of antitrust policy in the maintenance of a free economy."

[10] *United States* v. *First City National Bank,* 386 U.S. 361, 368 (1967), quoting *California* v. *F.P.C.,* 369 U.S. 482, 485, (1962).

travening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power.

Putting the problem in this light, relevant criteria would include the specific language of the congressional statute involved, any legislative history which would throw light on the congressional intent, the relative importance of the governmental action which is asserted to override antitrust policy, whether the governmental agency is required to take into consideration the possible anticompetitive effect of its actions, whether the agency is required to adhere to a clearly defined and restricted statutory directive, and to what extent the agency's actions are subject to judicial review.

We now turn to examine previous cases in which so-called governmental action immunity has been an issue, the answers given therein, and the principles which emerge therefrom.

A. *State regulation of business.*

Although it might be more logical to consider first the Federal Government's regulation of business, yet the cases relied upon most strongly by both parties involved state action raising questions under the federal antitrust laws, and since the Armory Board here is somewhat similar to a state governmental agency, we turn first to the state regulation cases.

The oldest called to our attention is *Olsen* v. *Smith,*[11] in which Texas harbor pilots, licensed by the State of Texas, sued to enjoin the activities of non-licensed pilots. The defendants challenged the state licensing system as being invalid under the federal antitrust laws, an argument which the Supreme Court rejected:

> [I]f the State has the power to regulate, and in so doing to appoint and commission, those who are to

[11] 195 U.S. 332 (1904).

> perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.[12]

Parker v. *Brown*[13] is apparently the decision which opened the eyes of the antitrust bar to the possibilities of avoiding the impact of the antitrust laws, if only state governmental action is in some way involved. In *Parker* the State of California, at the petition of some raisin growers, established market and price controls over California raisins, an action which necessarily had considerable impact on competition, since California produces most of the raisins consumed in the United States. The Supreme Court validated this marketing program, adopted pursuant to the California Agricultural Prorate Act, holding that the Sherman Act prohibits private action which has an anticompetitive effect, but does not apply to state action. The Court "found the California regulation consistent with the national policy embodied in the Agricultural Adjustment Act, which authorized the Secretary of Agriculture to impose similar marketing restrictions and which recognized the simultaneous coexistence of state regulation in its general instructions to the Secretary of Agriculture to harmonize state and federal regulation."[14]

Since the Court found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, *i.e.*, state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application

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[12] *Id.*, at 345.

[13] 317 U.S. 341 (1943).

[14] P. AREEDA, ANTITRUST ANALYSIS 57 (1967).

of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the prohibitions of the antitrust laws to this type state regulatory action.

In so doing, however, the Supreme Court did not give much emphasis to a comparative evaluation of the other important national policy, and used broad language which was to provide the foundation for a much more expansive governmental action immunity doctrine to be developed by other courts in later cases:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[15]

The Court also pointed out:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[16]

Thus, *Parker* v. *Brown* involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, *i.e.*, the Agricultural Adjustment Act, enunciated

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[15] 317 U.S., at 350-51.

[16] 317 U.S., at 352.

by the national Congress, which is also the source of federal antitrust policy.[17]

[17] Years later the Fourth Circuit explained some of the limitations inherent in *Parker* v. *Brown:*

> The teaching of *Parker* v. *Brown* is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to contral or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials. . . . (Citing cases.) . . . . But such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful. *Ashville Tobacco Board of Trade, Inc.* v. *F.T.C.* (4th Cir. 1959), 263 F.2d 502, 509. *Cf.* the most recent Fourth Circuit decision following *Parker, Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, — F.2d —, 39 U.S.L.W. 2453-54, (4th Cir. 12 Feb. 1971).

See also the recent decision of the Fifth Circuit in *Gas Light Co. of Columbus* v. *Georgia Power Co.*, — F.2d —, — 39 L.W. 2545, 2546 (5th Cir., 23 March 1971), where in considering the antitrust implications of the adoption by the Georgia Public Service Commission, regulating industry of undeniable importance to the state, the court said:

> Each of these acts and practices are (sic) rate schedules and each has been considered by the Georgia Public Service Commission in an adversary proceeding. Each is effective by order of the commission. . . . Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the commission as the products of the commission. They are thus immune from the operation of the antitrust laws under the Parker exemption.

The result reached differs from that by the same Circuit in *Woods,* but is justified by the fact that, although a state regulatory agency is involved in each instance, in *Woods* the action of the agency was alleged to be influenced by the *illegal agreement* among the private parties to furnish *false data,* while no such circumstance was alleged in *Gas Light.* However, the approach of Judge Bell in *Gas Light* gave more weight to the sheer existence of state action than did the attempt to reconcile antitrust and regulatory policies of Judge Goldberg in *Woods* or Judge Godbold dissenting in *Alabama Power,* perhaps because such comparative analysis was simply not called for on the facts of *Gas Light.*

The valid rationale of *Parker* v. *Brown* was recently extensively analyzed by the Fifth Circuit in *Woods Exploration & Producing Co., Inc., et al.* v. *Aluminum Company of America, et al.*[18] There two large-tract natural gas operators allegedly conspired to file false forecasts with the Railroad Commission of Texas, which regulates the allowable amount of gas to be produced from each well or unitized tract. These forecasts were used by the Railroad Commission to calculate the production allowable, and thus had a direct influence on the nature of the state regulatory action taken, particularly an adverse influence on the amount of production allowed small-tract natural gas operators, who filed the antitrust suit. The defendants relied upon *Parker* v. *Brown, supra, Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,*[19] and *United Mine Workers* v. *Pennington.*[20] The Fifth Circuit reversed the District Court's grant of summary judgment to the defendants, holding that the Woods case was similar to *Continental Ore Company* v. *Union Carbide and Carbon Corporation,*[21] where the Supreme Court held that defendants' anticompetitive activities were not protected

[18] *Supra,* note 6.

[19] 365 U.S. 127 (1961).

[20] 381 U.S. 657 (1965).

[21] 370 U.S. 690 (1962).

under the *Parker* rationale.[22] Judge Goldberg's carefully reasoned opinion also rejected the rationale "that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws." Rather, he considered that "state regulation does not mean that there is no room for antitrust policies to operate. . . . We therefore think it incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive."[23]

In *Woods* the Fifth Circuit took the approach of trying to reconcile the overall antitrust policy with the highly important state policy of regulating gas output. Where state regulatory action is concerned, this is a logical approach. But this reconciliation of state and federal goals is but a part of the overall problem, is only one example of several areas where the overall question is to what extent, if any, the Congress intended to permit action not consistent with the antitrust laws. In the case at bar we do not put the matter as an effort to make state and federal goals complementary rather than exclusive. Since Congress enacted both the antitrust laws and the

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[22] The *Woods* opinion describes *Continental Ore* thusly:

> There, a private firm acting as administrator of Canada's wartime rationing program used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. In defense of a private treble damage action, defendants asserted that the purchasing agent was acting as an administrator of the Canadian Government and that the conduct was therefore privileged under *Parker*. The Supreme Court, stressing that there was no evidence that the Canadian Government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. Again, in *UMW* v. *Pennington* . . . the Court reiterated this rationale and distinguished *Continental Ore* on the ground that in that case there had been no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of vanadium. . . ."

[23] *Supra*, note 6, slip op. at 8.

District of Columbia statute authorizing the construction of the stadium, the proper inquiry is to what extent, if any, Congress intended the action of the Armory Board not to be subject to the previously existing national antitrust policy. The appellees contend, and the trial court seemed to go on this theory, that where there can be established unequivocal state action the antitrust laws do not apply. We might paraphrase Judge Goldberg, "But this state [action] does not mean that there is no room for antitrust policies to operate."[24]

B. *State-created sole intrumentalities.*

In contrast with the technique of regulating a field of business with resulting undeniable anticompetitive effects, in some instances the state has either created or contracted with a corporate entity, which became the state's sole instrumentality in carrying out what clearly would otherwise be a governmental function.

In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*,[25] "[t]he Authority decided that it was necessary to have only one fixed base operation at Logan [Airport] and pursuant to that decision, entered into the lease with Butler-Boston. It is clear that in doing so it was acting as an instrumentality or agency of the state pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use." The action of the Authority in entering into the exclusive lease with Butler-Boston for the base operation at Logan Airport necessarily had an anticompetitive effect upon all other private corporations, including the plaintiff Wiggins Airways, who might have been involved in, or who might have desired to enter into, all or part of the activities constituting the operation of the base at Logan Airport. Wiggins sued under §§ 1 and

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[24] *Id.*

[25] 362 F.2d 52, 55 (1st Cir. 1966).

2 of the Sherman Act, alleging the exclusive lease contract was violative of these sections. Here obviously was a situation in which the state itself might have performed the very functions that it delegated to Butler-Boston as its exclusive instrumentality; hence, the First Circuit rejected the plaintiff's contention that the state action was violative of the federal antitrust laws.

A similar rationale lies behind the decision in *Ladue Local Lines, Inc.* v. *The Bi-State Developmental Agency of the Missouri-Illinois Metropolitan District.*[26] There Ladue, a private corporation engaged in bus transport in the metropolitan St. Louis area, alleged violation of § 2 of the Sherman Act in the organization of Bi-State through legislative action by Missouri and Illinois, and the subsequent action of Bi-State in the transportation of school children in the metropolitan area of St. Louis. The Eighth Circuit held:

> The fact that the effect of the compact gives Bi-State a monopoly and that competitive interests of private concerns are harmed does not violate the Sherman Act. We deem it well settled that when a state announces a public policy against free competition in an industry essential to it, state control and regulation of that industry, even to the extent of eliminating competition, is permissible.[27]

Here again the operation of a municipal bus line is something which the state or its creature, a municipality, might do for itself. Since an area in two states was involved, the legislatures of two states, with the approval of the United States Congress, created a bi-state authority to perform a strictly governmental function which, if performed by government, would certainly constitute a monopoly. The

[26] 433 F.2d 131 (8th Cir. 1970).

[27] *Id.*, at 137.

fact that the two states chose to create a separate public service non-profit corporation to serve as the sole instrumentality does not run afoul of the federal antitrust laws.

We suggest the obvious distinction of *Wiggins Airways* and *Ladue Local Lines* from the case at bar is that when Congress empowered the Armory Board to construct, maintain, and operate Kennedy Stadium, it was empowering the Armory Board to do what another governmental agency, such as the Interior Department, which does own the land and the stadium itself, could have done as straight-forward federal governmental action, *i.e.*, operate the stadium with full authority to rent to exhibitors of football games. On the rationale of *Ladue* and *Wiggins* such governmental agency action would not be subject to antitrust challenge, nor is the Board's management of the stadium *per se* challenged. But what Congress did not do is create the Board as an instrumentality to own and manage the only professional football team to be allowed to play in the stadium; hence, neither the Board nor the Redskins in this case are performing a function that a purely government agency itself could have performed. On this basis we consider that the rationale justifying holding the federal antitrust laws inapplicable to the state action in *Wiggins* and *Ladue* is not a rationale which supports the position of the appellees here.

C. *Joint efforts to secure governmental action.*

Two cases relied on by appellees here have been cited almost as much as *Parker* v. *Brown* for the proposition that where state action can be found the application of the antitrust laws cannot.

In an opinion heavy with overtones of First Amendment rights, the Supreme Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,[28] legitimatized

[28] 365 U.S. 127 (1961).

joint efforts by businessmen to influence legislative or executive action, holding that even actions designed to injure their competitors did not violate the Sherman Act.

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[29]

In *United Mine Workers* v. *Pennington*[30] a small mining company brought an antitrust action against larger mining companies and labor unions, alleging a conspiracy in violation of the Sherman Act, one of the objectives being to cause the Secretary of Labor to set unreasonably high wage rates and the ultimate objective being to put the small company out of business. The Supreme Court followed *Noerr* and held that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[31]

First Amendment rights following *Noerr* and *Pennington* were given their most expansive treatment in *United*

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[29] *Id.*, at 139.

[30] 381 U.S. 657 (1965).

[31] *Id.*, at 670. Without at this moment analyzing what the Congressional Act authorizing Kennedy Stadium does contain in the way of an antritrust exemption, we point out that *if* the Redskins had lobbied with Congress for a specific provision in the Stadium Act stating that in order to secure a long-term lease the stadium would be leased for professional football exclusively to one team, the activities of the Redskins in lobbying for such a provision would have fallen squarely within *Noerr* and *Pennington*, and clearly would have been valid as an exercise of First Amendment rights.

States v. *Johns Manville Corporation*,[32] where it was held that activities engaged in to influence the decisions of public procurement officials on product specifications so narrowly as to eliminate the products of competitors, "are constitutionally protected and cannot be the basis of a finding of violation of the antitrust laws, . . . regardless of the intent with which they were undertaken."[33] The Justice Department did not take an appeal from dismissal of the Johns Manville complaint by the District Court, and thus the rule of *Noerr-Pennington* was expanded to legitimatize combinations to influence the government's actions as a purchaser in the market, not only when acting in a sovereign legislative or regulatory capacity.[34] In the case at bar the government agency, the Armory Board, is not acting as a *purchaser* in the market, but rather as a *seller* of facilities in which football games can be played. If *Johns Manville* were binding precedent, the appellees' reliance on the *Noerr-Pennington* doctrine would be better placed. But even at the time of the *Johns Manville* District Court decision there were perspicacious observers[35] who predicted that the District Court opinion had given unwarranted scope to the *Noerr* doctrine and that ultimately application of the antitrust laws would prevail.

On the precise issue of *Johns Manville* the First Circuit in *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*[36] reached precisely the opposite result. For purposes of the appeal from the District Court summary judgment dismissing the plaintiff's treble damage antitrust complaint, the Court of Appeals assumed that the defendant

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[32] 259 F. Supp. 440 (E.D. Pa. 1966).

[33] *Id.*, at 453.

[34] *See generally* S. Oppenheim & G. Weston, Federal Antitrust Laws 160-162 (3d ed. 1968).

[35] *See* Antitrust and Trade Regulation Today 87 (J. Scott ed. 1969).

[36] 424 F.2d 25 (1970).

Paddock had combined with architects and others to write the specifications for pipeless swimming pools bought by public agencies in a way that would exclude competitors. The plaintiff Whitten was in the same business as Paddock, and alleged damages by these acts of Paddock, which were contended to be in violation of the antitrust laws. Paddock defended on the valid governmental action theory of *Parker* v. *Brown* and the rationale of *Noerr-Pennington* that under the First Amendment its efforts to influence public officials could not be in violation of the anti-trust laws. In a carefully reasoned opinion Judge Coffin and the First Circuit rejected both rationales. In rejecting *Parker* v. *Brown* as binding precedent, the First Circuit stressed, "Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."[37] In rejecting the *Noerr* analysis as applicable, the Court of Appeals said,

> The key to this decision, . . . is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy-makers. . . . By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter.[38]

The First Circuit also rejected *Pennington*, saying:

> The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers . . . . We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.[39]

[37] *Id.*, at 30.

[38] *Id.*, at 32.

In *Trucking Unlimited* v. *California Motor Transport Co.*,[40] the Ninth Circuit likewise declined to apply the *Noerr-Pennington* exemption. There trucking firms had united to oppose competitors' requests for certification with the California Public Utilities Commission and the Interstate Commerce Commission. The combine of trucking firms threatened to use its cumulative financial and legal weight to block any action by the regulatory Commission. The Ninth Circuit said:

> The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication, ... It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations they have no power to make.[41]

[39] *Id.*, at 33.

[40] 432 F.2d 755 (9th Cir. 1970).

[41] *Id.*, at 758-759.

The court in *Trucking Unlimited* apparently considered that an adjudicative agency was in a position similar to a governmental agency charged with procurement, as in *Paddock Pool.* In neither case was the governmental agency in a position to make governmental policy, it was obligated to carry out the policy as already made, hence the rationale of *Noerr-Pennington,* guaranteeing access of private parties in combinations which would otherwise be illegal under the antitrust laws to influence such agency simply did not apply.

Trucking Unlimited illustrates again that the determination that a state agency and state action are involved "is only the beginning of the inquiry." In this category of joint efforts to secure governmental action we are discussing belongs, of course, *Woods Exploration and Producing Co., Inc.* v. *Aluminum Company of America, supra,* already analyzed in full.

D. *Federal government regulation of business.*

We have deferred an examination of decisions relating to federal government regulation of business until last for several reasons. Both parties in the case at bar relied most heavily on the decisions involving state action. The Supreme Court decisions in *Parker, Noerr,* and *Pennington* contained over-broad language in regard to the effect of state action on the applicability of the antitrust laws, and, in our opinion, subsequent decisions in lower courts have not always fully taken into account the rationale behind those Supreme Court decisions. On the other hand, the decisions on the applicability of the federal antitrust laws where federal regulation of business is involved have always proceeded on a different basis. As has been observed,

> Each of the regulated industries presents a unique problem when its status under the antitrust laws needs definition or clarification. The Supreme Court has taken the position Congress has the responsibility of deciding the role of competition for each regulated industry. Therefore, each case is decided on the basis of the wording of the particular statute involved. . . . A detailed study of the legislative history and an assessment of the "pervasiveness" of the "regulatory scheme" set out in the particular statute are earmarks of each of the Court's opinions on the function of antitrust policy in regulated industries.[42]

While the leasing of public stadiums to professional sports teams is not a regulated industry, it should not be forgotten that that Stadium Act and the antitrust laws were both enacted by the same legislative body, *i.e.,* the U.S. Congress. Therefore, there arises a similar problem of determining congressional intent as to the applicability or non-applicability of the antitrust laws, as we frequently have in the case of a federal government regulated industry. And, as mentioned above, some of the cases relied on most heavily by both parties, *e.g., Parker* v. *Brown,* have to do with state regulated industries. Therefore, it is clear that the way the Supreme Court and other courts have analyzed the applicability of the antitrust laws in federal regulated industries is highly pertinent to the analysis we make here of the Stadium Act, the applicability of the antitrust laws to that Act, and the action of the Armory Board taken thereunder.

In *Silver* v. *New York Stock Exchange* [43] the Court considered "the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted. The Securities Exchange Act contains no express exemption from the antitrust laws

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[42] ANTITRUST AND TRADE REGULATION TODAY 241 (J. Scott & Rockefeller ed. 1967).

[43] 373 U.S. 341 (1963).

or, for that matter, from any other statute."[44] The Court therefore held that "the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act,"[45] and that such relevant purposes did not require immunizing the Exchange from liability for treble damages.

In *United States* v. *Philadelphia National Bank*[46] the Court likewise declined to find that the antitrust laws (§ 7 of the Clayton Act) did not apply, in spite of the broad regulatory powers given the Comptroller of the Currency. This was followed by *United States* v. *First National Bank and Trust Co. of Lexington,*[47] in which the Court again held that bank mergers approved by the Comptroller are subject to antitrust laws and may be prohibited by § 1 of the Sherman Act. On the same day in *United States* v. *El Paso Natural Gas Co.*[48] the Court similarly held that Federal Power Commission approval of a utility merger does not render non-applicable the antitrust merger provisions of § 7 of the Clayton Act.

However, in the *Panagra* case[49] the Court found that "the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems," that the "acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority,"[50]

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[44] *Id.*, at 357.

[45] *Id.*, at 364.

[46] 374 U.S. 321 (1963).

[47] 376 U.S. 665 (1964).

[48] 376 U.S. 651 (1964).

[49] *Pan American World Airways* v. *United States,* 371 U.S. 296 (1963).

[50] *Id.*, at 305.

and thus the complaint should have been dismissed.[51] Like other regulatory agency cases involving the applicability of antitrust laws, the *Panagra* decision was posited squarely on the particular statute under which the Civil Aeronautics Board operates; hence, this contrary result is by no means inconsistent with the Supreme Court's decisions in the other cited cases. As another example, in *United States* v. *Radio Corporation of America*[52] the Court held that the Federal Communications Commission had no authority to decide antitrust issues. The Federal Communications Act[53] explicitly makes the antitrust laws applicable to the broadcast industry.

The maritime industry operates under the power of the Federal Maritime Commission specifically to grant exemptions from the antitrust laws. This power is not to be exercised loosely, hence in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien (Swedish American Line)*[54] the Court upheld the Commission regulation that shipping "conference restraints which interfere with the policies of the antitrust laws will be approved *only* if" the conferences can show that they are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."[55]

From this review of recent regulatory agency cases involving the applicability or non-applicability of the antitrust laws, it clearly emerges that Congress knows how to

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[51] The Court construed the antitrust exemption to be only as broad as specified in the statute. "We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce." (At 305).

[52] 358 U.S. 334 (1959).

[53] 47 U.S.C. 151 *et seq.*

[54] 390 U.S. 238 (1968).

[55] *Id.*, at 243. (Emphasis supplied.)

spell out an exemption from the antitrust law when it wants to do so, *e.g.*, the CAB and the FMC, where the agencies give consideration to antitrust policy[56] but make the initial decisions themselves, and in contrast to proceedings in the Federal Communications Commission, where any action by the FCC is specifically open to antitrust challenge. When the Congress was dealing with football and other sports,[57] it passed a special statute which permits professional sports teams to negotiate for all league members for television rights, and provides that "[t]he antitrust laws . . . shall not apply to any [such] joint agreement . . . ."[58] It also reaffirmed the usual applicability of the antitrust laws to any other contract "by, between, or among persons engaging in, conducting,

[56] Two recent decisions of our court should be noted, although the issue of the non-applicability of the federal antitrust laws was not directly raised. In *Marine Space Enclosures, Inc.* v. *F.M.C.*, 137 U.S. App. D.C. 9, 420 F.2d 577 (1969), FMC approval of a contract between New York City and the New York Port Authority containing restrictive covenants was challenged. This court remanded the case to the Commission for further proceedings fully exploring the antitrust questions arising from the restraints in the contracts. It may be implied from this ruling that even though the antitrust laws do not invalidate contracts approved by the Federal Maritime Commission, and this contract was between government entities, yet the responsible governmental body, *i.e.*, the FMC, was required to give due consideration to national antitrust policy. In *National Aviation Trades Association* v. *C.A.B.*, 136 U.S. App. D.C. 367, 420 F.2d 209 (1969), this court had before it an airport management contract between Pan American Airways and the New York Port Authority, somewhat similar to that involved in *Wiggins Airways, supra*. The Federal Aviation Act requires the CAB to weigh the antitrust considerations, and hence this court reviewed the record supporting the Board's findings that the contract would not create a monopoly in violation of the national antitrust policy.

[57] Telecasting of Professional Sports Contests Act, 15 U.S.C. § 1291 *et seq.*

[58] 15 U.S.C. § 1291 (1961), as amended, 15 U.S.C. § 1291 (1966).

or participating in the organized professional team sports of football, . . . "[59]

III. *The District of Columbia Stadium Act and the Claimed Non-applicability of the United States Antitrust Laws*

The appellees make as part of their principal argument a claim that the provisions of the District of Columbia Stadium Act exempt the stadium lease from application of the antitrust laws. In support of this they point to the specific language of the Stadium Act and its legislative history.

A. *The Statute.*

The D.C. Stadium Act does provide in part:

> In order to carry out the purposes of this subchapter, the Board is authorized *without regard to any other provision of law*, . . .
>
> (1) to determine all questions concerning the use of the stadium . . .
>
> • • • •
>
> (8) *to rent or lease* from time to time for any of the purposes of this subchapter, all or any part or parts of the stadium . . . for such periods of time as the Board shall determine . . . .[60]

It is on the language "without regard to any other provision of law" that appellees primarily rest their case that the U.S. antitrust laws do not apply to a lease of the stadium for any purpose, including a lease requiring exclusive use by one professional football team for thirty years.

[59] 15 U.S.C. § 1294.

[60] 2 D.C. Code § 1723. (Emphasis supplied.)

The appellees do recognize however, that the expression "without regard to any other provision of law" does not confer a limitless exemption. Deposition testimony considered by the trial court in ruling on the summary judgment shows that responsible officials of the Armory Board consider that operation of the stadium is subject to all the police, fire, and health regulations in the District of Columbia. Administrative practice is in accord with this interpretation. And counsel for the appellees on oral argument said that of course the Armory Board has no power to lease the stadium for an illegal purpose. Congressional statutes, we are told, and we agree, should not be interpreted so as to lead to absurd or obviously unintended irrational results.

But exemption from the criminal and public safety statutes is not the only result which might be characterized as irrational and therefore not intended. Certainly the strong policies against behavior deemed by Congress criminal or hazardous to public safety militate against any conclusion that in passing subsequent legislation Congress intended to authorize such conduct. Yet other statutes further policies so basic to our social structure that—in the absence of unequivocal exemption therefrom, either by specific statutory language or by a purpose to enforce other policies of equal or greater importance—it would be irrational to imply that Congress intended to authorize the conduct they prescribe. Preeminent among these are the antitrust laws, designed to preserve free enterprise by prohibiting restraints upon free competition.

Under the wording of § 1723 the Board is authorized without regard to any other provision of law to carry out the purposes of the subchapter, which are defined in § 1720 as "to provide . . . a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility . . . ." Of particular significance

to our analysis is subparagraph (3) of § 1723, which authorizes the Board to acquire property and equipment necessary to carry out these purposes "except that no contract for more than $3,000.00 shall be entered into for the purpose of this paragraph *without competitive bidding.*" (Emphasis supplied.)

This latter language indicates that Congress considered that the exemptive expression relied upon by appellees made it unnecessary for the Board to follow any specific competitive bidding regulations in letting ordinary contracts, and so, under this subparagraph, it was necessary to provide for the use of competitive bidding in letting *larger* contracts having a value in excess of $3,000.00. More than Congress' preoccupation with such regulations, however, this language indicates to us Congress' concern to preserve the competitive spirit in larger contract offerings, even at the expense of its declared goal of permitting the Board to operate the stadium as a private venture.

Consistent with this, it is difficult to understand: first, if Congress intended the phrase "without regard to any other provision of law" to embrace the antitrust laws, *why* it adopted an anti-free competition attitude in regard to the largest and most important contracts—for long-term rental—the Board was authorized to make, while carefully preserving competition by requiring competitive bidding on other contracts over $3,000.00; second, if Congress did intend to exclude the applicability of the antitrust laws, *why* it did not do so in language as clear and specific as that used to define the applicability of the competitive bidding statute.

There is simply no reference in the Stadium Act (or in its legislative history) to the antitrust laws specifically. We are not cited to any other federal statute with language comparable to that of the Stadium Act which has been construed to rule out the applicability of the antitrust laws.

B. *The legislative history.*

Looking at the legislative history of the Act, we find no support for the argument that Congress intended to place the activities of the Board under § 1723 beyond the pale of the antitrust laws. In fact, the inferences we gather from examining the legislative history point to the opposite conclusion.

A statement made by Senator Bible, the then Chairman of the District of Columbia Committee, when he was reporting to the Senate on an amendment to subparagraph (6) of § 1723, dealing with concessions in the proposed stadium, is relevant:

> The Committee felt that, inasmuch as the stadium is to be in the *nature of a private venture,* it was more desirable that the Board be *vested with the authority to make its own decisions* as to the letting of concessions, without making restrictions on the Armory Board. (Emphasis supplied.) [61]

This bit of legislative history indicates the motivations behind the drafting of the Stadium Act. Though in reality run by the Government, the stadium was to be in the nature of a private venture. It therefore follows that the Committee must have intended the stadium's operator, the Armory Board, to be free from the aegis of those regulations applying to government agencies which would hamper functioning as a private business. These would include competitive bidding and federal procurement regulations, but would not include the antitrust laws, to which private businesses *are* subject; hence, the strong inference that the expression "without regard to any other provision of law" was meant by Congress to refer only to regulations applying to government agencies.

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[61] 103 Cong. Rec. 13567 (1957).

In arguing for the conclusion that Congress did intend the Board's leasing activities to be exempt from the antitrust laws, the appellees stress that it was essential for the construction of the stadium and its subsequent profitable operation (it has not been profiitable) that the Armory Board enter into a long term lease with the Redskins football team, and that Congress knew this. In fact, it is fair to say on the congressional testimony that the stadium would not have been built without a long-term lease from both the Redskins professional football team and the Washington professional baseball team.

This is not to say, however, that the leases could not have been secured without the restrictive covenant giving exclusive rights with respect to any particular form of use, and the appellees concede that there is nothing in the legislative history which mentions the question of whether the Redskins or any other tenant would be given such a restrictive covenant. Whether the Redskins would have signed a thirty-year lease without such a restrictive covenant is entirely speculative, but it is fair to point out that appellants' argument that there is no place in the District of Columbia suitable for professional football other than Kennedy Stadium is uncontradicted, that the Redskins might have been faced with the alternative of having no access at all to Kennedy Stadium unless they did sign a long-term lease, and that the possibility of bringing in another professional football team of a competitive league could not have been excluded.

C. *Comparative importance of the policies behind the Stadium Act and national antitrust policy.*

We think it significant that in those cases where the antitrust laws were held *not* to apply there was a national or state policy of importance approximately equal to the antitrust laws involved. For example, in *Parker* v. *Brown* the state action was regulation of an important

agricultural product, and a state regulation completely consistent with the federal Agricultural Adjustment Act. In *Noerr* and *Pennington* the constitutional First Amendment rights formed the underpinning of the decision that the actions of the private parties there in soliciting governmental action were not in violation of the antitrust laws. Similarly, in the federal regulatory cases such as *Silver, Philadelphia Bank,* and others discussed above, there was a conscious or implied evaluation of the importance of the national policy reflected in the creation of the regulatory agency compared with that of the federal antitrust laws. The agency's responsibilities, the "pervasiveness of the regulatory scheme," the extent to which the agency itself was called upon to pass upon antitrust considerations, and the degree to which it had in fact done so as reflected in the record,[82] were all considered. Since the creation of the regulatory agency and the definition of its responsibilities stemmed from the same source as the antitrust laws, *i.e.*, the U.S. Congress, an effort was made to reconcile the possibly conflicting national policies. In almost every case there is a reiteration of the theme that repeal or immunity or exemption from the federal antitrust laws will not be lightly implied.

We suggest that the action of Congress in providing a public stadium for the District of Columbia, while a governmental act of considerable importance to this particular community, hardly rises to the same dignity or furthers as important policies as the action of Congress in regulating the securities exchanges, the national banks, oil and gas pipelines, aviation or maritime routes, and that if in the consideration of cases arising from those federal regulatory agencies it is necessary for the Supreme Court and other courts to examine the extent to which the anti-

[82] *See, e.g.*, this court's decisions in *Marine Space Enclosures Inc.* v. *F.M.C.*, *supra*, and National Aviation Trades Association v. *C.A.B.*, *supra*

trust laws apply,[83] it is reasonable to hold here that we must find a definite, clearly expressed, specific intent of Congress to rule out the applicability of the antitrust laws to the acts of the Armory Board before such exemption can be granted.

On examination of the statute, the legislative history, the administrative practice, a comparison of the Stadium Act with other federal statutes referring or not referring to antitrust applicability, and the relevant cited cases, we do not find that the applicability of the federal antitrust laws has been excluded. We therefore hold that the validity of the thirty-year lease between the appellees Armory Board and Pro-Football, Inc., must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties. For trial on the merits in accordance with this opinion the judgment of the District Court is reversed and the case

Remanded.

[83] As shown by the cited cases, the rule generally is that the antitrust laws *do* apply unless there is a specific exemption, as in the FMC or CAB cases; and, even in those, there must be a showing in the record that the regulatory agency has properly considered the antitrust implications in its decisions.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is hereby remanded to the District Court for a trial on the merits, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:
NATHAN J. PAULSON
Nathan J. Paulson
Clerk

Dated: April 27, 1971.
Opinion by Circuit Judge Wilkey.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2815-66

NORMAN F. HECHT, ET AL., *Plaintiffs,*

v.

PRO-FOOTBALL, INC., ET AL., *Defendants.*

OPINION

This action, as asserted by the plaintiffs in their second amended complaint, was brought against the defendants under § 4 of the Clayton Act (15 U.S.C. § 15), to recover treble damages and obtain injunctive relief because of alleged violations by the defendants of §§ 1, 2, and 3 of the Sherman Act (15 U.S.C. §§ 1, 2 and 3). Only the first three claims of plaintiffs' second amended complaint are pertinent to the matter before the Court. Those claims are set forth separately in what plaintiffs have denominated Counts 1, 2 and 3. The plaintiffs and some of the defendants have filed cross motions for partial summary judgments.[1]

The defendants joining in a motion for partial summary judgment are the National Football League, the District of Columbia Armory Board and its individual members, and Pro-Football, Inc., hereinafter referred to as "Redskins."[2]

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[1] Certain other defendants named in the second amended complaint were either served and thereafter dismissed or have not been served.

[2] Pro-Football, Inc. is a corporation which owns and operates in the District of Columbia a professional football team as a member of the National Football League. That team is known as the Washington Redskins.

Count 1 of the second amended complaint charges the defendants with entering into a contract in restraint of trade in violation of §§ 1 and 3 of the Sherman Act. Count 2 of the second amended complaint charges the defendant Redskins as being engaged in an attempt to monopolize the business of professional football in the District of Columbia in violation of §§ 2 and 3 of the Sherman Act. Count 3 of the second amended complaint charges the defendants Redskins and the National Football League of having been engaged and now being engaged in an unlawful conspiracy to restrain and monopolize, and of engaging in an attempt to monopolize, and of having monopolized, the business of professional football in the District of Columbia in violation of §§ 1, 2 and 3 of the Sherman Act.

Essentially the charges made by plaintiffs in Counts 1, 2 and 3 of the second amended complaint arise out of a lease agreement made on December 24, 1959, between the District of Columbia Armory Board and the Redskins and particularly paragraph II(e) of that agreement. By that instrument the Armory Board leased to the Redskins for a period of 30 years, beginning with the football season of 1961 and terminating at the conclusion of the football season of 1990, the now named Robert F. Kennedy Stadium for the purpose of exhibiting all Redskins home professional football games. The lease provided that at no time during its term would the stadium be let or rented to any professional football team other than the Redskins. Plaintiffs assert that that restrictive covenant constituted a contract in unreasonable restraint of the business of professional football in the District of Columbia; that it granted the Redskins a monopoly of the business of professional football in the District of Columbia. And plaintiffs further assert that the restrictive covenant resulted from an unlawful combination and conspiracy being engaged in by the Redskins and the National Football League to restrain and monopolize professional football in the District of Columbia.

The undisputed facts disclose that the Redskins is a professional football team and the only football team which engages in the exhibiting of professional football games in the District of Columbia. The National Football League is an unincorporated association of professional football teams located in several cities in the United States. The Redskins is a member of the National Football League and it plays football games with other teams which are members of the National Football League. The schedules of such games are made up by the National Football League and certain services, such as game officials, are made available to the participating teams by the National Football League. The Redskins have been engaged in exhibiting professional football in the District of Columbia for a period of more than 25 years.

Plaintiffs Hecht, Kagan and Miller describe themselves as joint venturers who desire to participate in the ownership of a professional football team that would play its games in the District of Columbia. They assert that because of the restrictive covenant in the Redskins lease with the Armory Board they were unable to organize an American Football League team and a Continental Football League team in the District of Columbia. Plaintiff Washington Federals, Inc. is a corporation created for the purpose of organizing and operating in the District of Columbia a professional football team. Plaintiffs Hecht, Kagan and Miller own all of the stock of the Washington Federals, Inc. Plaintiff United States Football League, Inc. is a non-profit corporation which Hecht, Kagan and Miller helped to form. The Washington Federals, Inc. is allegedly a member of the United States Football League, Inc. Neither the Federals nor any other franchise holder in that League has ever employed coaches and players let alone fielded a team or played a game.

The American Football League, at the time plaintiffs, Hecht, Kagan and Miller announced they were interested in organizing a Washington team in that league, was a

separate and competing league from and with the National Football League. Since the institution of this action in 1966, the National Football League and American Football League have merged. That merger and its effects are not relevant to the claims asserted in the Counts 1, 2 and 3 of the second amended complaint.

The Continental Football League has been described by Hecht as a minor football League.

Hecht, Kagan and Miller have never owned nor been associated with an organization which owned and operated a professional football team. Nor have they had any experience with professional football. Hecht is the manager and assistant cashier of a branch bank; Kagan is part owner and operator of a retail liquor store; Miller operates a restaurant. At the time of oral argument counsel for the plaintiffs conceded that, other than as promoters who are attempting to organize a professional football team, plaintiffs Hecht, Kagan and Miller had no business or property that could in any way be injured by the alleged violations of the antitrust laws.

Plaintiffs argue that the restrictive covenant in the Redskins' lease is on its face a contract in restraint of trade and commerce. Defendants respond by asserting that the lease being a contract of the Armory Board, a governmental agency, is not within the scope of the Federal antitrust laws.

In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, et al.*, 362 F.2d 52 (1 Cir., 1966), *cert. denied*, 385 U.S. 947 (1966), plaintiff Wiggins sought to recover treble damages and obtain equitable relief on its claim that defendants Port Authority and two corporations had entered into a conspiracy, combination or contract in restraint of trade or commerce in that they attempted to establish a sole and exclusive fixed base operation at Logan Airport in Boston, Massachusetts, and that each of the defendants attempted to monopolize and combined or conspired to monopolize the fixed base operation business, all allegedly

in violation of §§ 1 and 2 of the Sherman Act.[3] The contract with the Port Authority gave the defendant corporations the exclusive right to the fixed base operation at Logan Airport. For some years prior to that contract Wiggins and another company conducted fixed base operations as competitors at Logan Airport. Both Wiggins and the competing company, as a result of the Port Authority's contract with the defendant corporations, were no longer permitted to do a fixed base operation business at Logan Airport. The United States District Court for the District of Massachusetts entered a judgment dismissing the action on the ground that the complaint did not state a claim upon which relief could be granted. The Court of Appeals, in affirming the District Court, stated, 362 F.2d at 55:

> In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with Butler-Boston. It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use. Plaintiff's contention that the Authority in operating Logan Airport is engaged in a purely proprietary capacity and is conducting a private business has no merit. Nor does the arrangement with Butler-Boston violate the Sherman Act. What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action.

The court having found that the Port Authority's conduct was lawful further held that it would be "unreason-

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[3] "A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. It is vital to air transportation." 362 F.2d 53, n. 2.

able restriction on its freedom to hold that the other defendants acted illegally in having aided it" in the performance of a governmental function. 362 F.2d 56.

In *Sun Valley Disposal Co., Inc.* v. *Silver State Disposal Co., et al.*, —— F.2d ——, (9 Cir., December 17, 1969), a summary judgment for defendants was affirmed. There plaintiff had operated a garbage pick up and disposal service in Clark County, Nevada. In engaging in that business it had been competing with one of the defendants until the latter obtained an exclusive franchise from the Clark County Commission, a governmental body. In holding that the exclusive garbage collection and disposal service contract was not illegal the Ninth Circuit cited *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, supra,* as holding that "valid municipal action is without the scope of the federal antitrust laws."

The *Wiggins* and *Sun Valley* decisions are consistent with the rulings of the Supreme Court and other courts that valid governmental action is not subject to the Federal antitrust laws. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127 (1961), *Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), *Parker* v. *Brown,* 317 U.S. 341 (1943), *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.,* 394 F.2d 672 (5 Cir., 1968), rehearing denied, 397 F.2d 809 (1968), *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* 284 F. Supp. 582 (S.D. Texas, 1968).

The plaintiffs would distinguish *Wiggins* and *Sun Valley Disposal Co.* by asserting that the agreements in those cases were the result of governmental action while the leasing of the stadium by the Armory Board to the Redskins was in the nature of a business or proprietary act on the part of the Board. Plaintiffs cite *District of Columbia* v. *Green,* 96 U.S.App.D.C. 20, 223 F.2d 312 (1955), as an authority in support of their contention. But that case had to do with the question of governmental immunity from an action for negligence and not with the matter of

immunity from the application of the antitrust laws. The history of immunity or want of immunity in tort actions with respect to municipal corporations is to say the least inconsistent and imprecise. It deals with the difference between discretionary and ministerial acts by municipal corporations as well as efforts to distinguish governmental functions exercised solely for the public at large from those for the private benefit of the municipality. Thus it has been held that fire prevention, police and education are governmental functions while activities related to *municipal railways, airports, gas, water and light systems* are proprietary. But there has been no consistency in the decisions of the courts. 54 Harv. L. Rev. 437, 442, 34 Yale L.J. 129, 22 Va. L. Rev. 910, 914-917, *Hesse* v. *Rath, et al.,* 249 N.Y. 435, 164 N.E. 342 (1928), *Scibilia* v. *City of Philadelphia,* 279 Pa. 549, 124 A. 273 (1924), *City of Cleveland* v. *Ruple,* 130 Ohio St. 465, 200 N.E. 507 (1936).

Nor does *District of Columbia* v. *Green, supra,* any longer have its original vitality. Its ruling was undercut in *Elgin* v. *District of Columbia,* 119 U.S.App.D.C. 116, 337 F.2d 152 (1964). Moreover, in the recent case of *Spencer* v. *General Hospital of the District of Columbia,* —— U.S. App.D.C. ——, —— F.2d —— (November 10, 1969), the Court of Appeals sitting *en banc* provided "a formal interment of the 'governmental-proprietary' test of immunity."

In applying the "one man one vote" principle, the Supreme Court has considered the building and running of hospitals and the establishing of a housing authority as carrying out governmental functions. *Avery* v. *Midland County,* 390 U.S. 474, 476-477 (1968).

In *City of Cleveland* v. *Ruple,* 130 Ohio St. 465, 200 N.E. 507, the Cleveland municipal stadium and the related city owned structures, including public halls and a parking garage, were held to have been constructed and leased for public purposes. That such purposes attach to the stadium here is evident from a review of the District of Columbia Stadium Act.

The Robert F. Kennedy Stadium was constructed pursuant to an Act of Congress originally enacted in 1957 and subsequently amended in 1958 and again in 1959. § 2-1720 D. C. Code (1967). That statute expressly authorized the Armory Board to construct, maintain and operate the stadium "[i]n order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility." In order to accomplish that purpose the Secretary of the Interior was authorized to acquire "by gift, purchase, condemnation or otherwise" certain described property and to enter into a contract with the Armory Board for the construction, maintenance and operation of the stadium which contract was to be for a term not exceeding thirty years. § 2-1721 D.C. Code (1967). The Armory Board, in order to carry out the purposes of the Act, was authorized among other things to determine all questions concerning the use of the stadium for the purposes of the Act, to operate or contract for the operation of concessions deemed appropriate for the purpose for which the stadium might be rented or leased, to furnish services to lessees as in the judgment of the Armory Board were necessary or suitable for carrying out the purposes of the Act, and to lease the stadium for any of the purposes of the Act at such rental values and for such periods of time as the Board should determine. It was pursuant to the authority thus vested in the Board that the lease complained of by the plaintiffs was entered into by the Redskins. § 2-1723 D.C. Code (1967).

That lease was executed on December 24, 1959, for a term of thirty years, which term was to commence with the football season of 1961, and to terminate at the conclusion of the football season of 1990. As the legislative history of the District of Columbia Stadium Act reveals, there would have been no stadium unless a long-term lease could be negotiated by the Armory Board with the Redskins. When the legislation was under consideration by the committees

of Congress the then Chairman of the Armory Board asserted that without a long-term Redskin lease the stadium could not be constructed.[4]

The fact that there is a thirty year lease with the Redskins is significant for two reasons. First, the Stadium Act provides that the Secretary of the Interior's contract with the Armory Board for the construction, maintenance and operation of the stadium was to be for a term of not more than thirty years. Thus that contract and the Redskins' lease are for approximately the same thirty years. Second, Congress authorized the Armory Board to provide for the payment of the construction, operation and maintenance of the stadium through the issuance of bonds with the principal payable not later than thirty years from the date of issuance.[5]

Thus, the Armory Board was not only authorized to provide the people of the District of Columbia with a suitable stadium but it was obligated to provide for the payment of the construction, operation and maintenance of the stadium through a bond issue. The sinking fund for the payment of the bonds' principal and interest is to be derived from the receipts resulting from the exercise of the Board of its statutory powers, including the leasing of the stadium. Faced with the obligations imposed by the Act and aware that a long-term lease with the Redskins was necessary if those obligations were to be met and the purposes of the Act accomplished, the Armory Board entered into the complained of lease agreement. Thus, the leasing of the

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[4] Transcript of Hearings on S. 3736 and H.R. 12162 before the Subcommittee on the Judiciary of the House Committee on the District of Columbia and the Subcommittee on Fiscal Affairs of the Senate Committee on the District of Columbia, 85th Cong., 2d Sess. (p. 88).

[5] In the event refunding bonds were issued they would mature no later than thirty years from their issuance, or fifty years from September 7, 1957, whichever occurred first.

stadium was pursuant to the mandate of the Act and was governmental action. As such it was as much exempt from the antitrust laws as was the exclusive agreement entered into by the Massachusetts Port Authority in its exclusive lease to the Butler-Boston Company and the exclusive franchise contract between the Clark County Commission and Clark Sanitation, Inc.

Since the Armory Board's conduct was lawful the Redskins did not act illegally in entering into the lease.[6] To conclude otherwise "would be an unreasonable restriction" on the Board's freedom. *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 56, *cert. denied,* 385 U.S. 947 (1966), *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.,* 394 F.2d 672, 677, rehearing denied, 397 F.2d 809 (1968). No violation of the Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 136 (1961).

Notice has been taken of the other contentions of the parties. Some are inappropriate for consideration on motions for summary judgment; others are without merit.

The motion of defendants Armory Board, Pro-Football, Inc. (Redskins) and the National Football League for summary judgment on Counts 1, 2 and 3 of the second amended complaint is granted.

The motions of plaintiffs on Counts 1, 2 and 3 of the second amended complaint are denied.

WILLIAM B. JONES
Judge

April 16, 1970

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[6] The National Football League contends it had nothing to do with stadium lease. But assuming it had, it, like the Redskins, would not have been acting illegally.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1819

NORMAN F. HECHT, HARRY KAGAN
and MARC A. MILLER, joint venturers, APPELLANTS

WASHINGTON FEDERALS, INC. a corporation, et al.

v.

PRO-FOOTBALL, INC., a corporation, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 2815-66)

Argued 20 December 1976

Decided 20 December 1977

William Joseph H. Smith for appellants.

Bernard I. Nordlinger with whom *Robert B. Frank* was on the brief, for appellee, Pro-Football, Inc., also argued for appellee, D.C. Armory Board.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Louis P. Robbins, Principal Assistant Corporation Counsel for District of Columbia, *Richard W. Barton*, Assistant Corporation Counsel and *Leo N. Gorman*, Assistant Corporation Counsel at the time the brief was filed, were on the brief for appellee, D.C. Armory Board. *C. Francis Murphy*, Corporation Counsel at the time the record was filed, also entered an appearance for appellee, D.C. Armory Board.

Before: MCGOWAN, *Circuit Judge*; HARRISON L. WINTER,* *Circuit Judge* for the Fourth Circuit and WILKEY, *Circuit Judge*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This is a private antitrust action. Plaintiffs Hecht, Kagan, and Miller (hereafter collectively "Hecht") are a group of promoters who in 1965 sought unsuccessfully to obtain an American Football League (AFL) franchise for Washington, D.C. Defendants are Pro-Football, Inc., operator of the Washington Redskins (the Redskins), and the District of Columbia Armory Board, an unincorporated instrumentality of the District of Columbia which operates and maintains Robert F. Kennedy (RFK) Stadium under contract with the Interior Department.[1] The Armory Board leases RFK Stadium to the Redskins. Hecht attacks a restrictive covenant in that lease.[2]

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* Sitting by designation pursuant to Title 28, U.S.C. § 291(a).

[1] The land on which the stadium is located is owned by the United States.

[2] The lease runs from 1961 to 1990. Paragraph II(e) thereof provides that "at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins." Plaintiffs'-Appellants' Appendix (App.) 34-35.

Hecht contends that RFK Stadium is the only stadium in the Washington metropolitan area suitable for the exhibition of professional football games; that the restrictive covenant prevented him from obtaining the use of the stadium; and that his inability to obtain the use of the stadium prevented him from submitting an acceptable franchise application to the AFL owners, and thus from competing with the Redskins in the Washington professional football market. Hecht's complaint alleges that the restrictive covenant constitutes a contract in restraint of trade, in violation of Sherman Act §§ 1 and 3;[3] and that the Redskins, in obtaining the covenant and refusing to waive it, have monopolized professional football in Washington, D.C., in violation of Sherman Act § 2.[4] The case was tried to a

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[3] Sherman Act § 1, 15 U.S.C. § 1 (Supp. V 1975) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Sherman Act § 3, 15 U.S.C. § 3 (Supp. V 1975) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

[4] Sherman Act § 2, 15 U.S.C. § 2 (Supp. V 1975) provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

jury,[5] which rendered a verdict for defendants. Hecht appeals numerous instructions and evidentiary rulings. We reverse and remand for a new trial.

I. Facts

Formed in 1959-60 with eight franchised teams, the AFL by 1965 was seriously considering expansion. It planned to grant two new franchises, one to a city with an NLF franchise and one to a city with no professional football team. The granting of any new franchise required the affirmative votes of six clubs.

In June 1965 Hecht and his associates organized an original group of investors. This group had no football experience and limited financial strength, but possessed a general familiarity with business affairs. Hecht sent a franchise application form to the AFL, and followed it with a meeting in late June with AFL Commissioner Foss. They discussed details of the application, the need for Hecht to bolster his group's financial position, and the feasibility of gaining access to RFK Stadium in view of the Redskins' lease. In that connection, Hecht and Foss discussed the advisability of soliciting the aid of the Interior Department in obtaining the use of RFK Stadium.

Shortly after this meeting, Hecht persuaded three additional investors to join his promotional group. These were men of considerable means. Hecht also met with Stewart Udall, then Secretary of the Interior. Udall

[5] The trial was held on remand from this Court. *Hecht v. Pro-Football, Inc.* (*Hecht I*), 444 F.2d 931, 947 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). In *Hecht I*, the district court granted summary judgment for the defendants on the ground that the Board's leasing of RFK Stadium was governmental action immune from the antitrust laws. We reversed and remanded for trial on the merits, concluding that Congress had evinced no intention to confer such immunity.

apparently responded favorably to Hecht's proposal, and told Hecht that his staff would investigate the legality of the restrictive covenant in the Redskins' lease.

In July 1965 Hecht submitted a written offer to purchase an AFL franchise, couching the application in a form suggested by Commissioner Foss. During July and August there were numerous interchanges between Hecht and the AFL group, about which there was conflicting evidence. These events need not be detailed. Hecht presented evidence which tended to show that his promotional activities were serious and that at least some members of the AFL expansion committee favored his application; he presented one piece of evidence which suggested that if he got the stadium he would get the franchise. The Redskins presented evidence which tended to show that the AFL owners never seriously considered expansion to Washington and that Hecht's application never had a chance of being approved.

On 7 September 1965 Hecht submitted a written proposal to the Armory Board for shared use of RFK Stadium. The Board told Hecht that it could not negotiate a lease with him owing to the restrictive covenant in the Redskins' lease. The Board also said, however, that it would gladly consider any arrangement acceptable to the Redskins under which Hecht could use the stadium (*i.e.*, a waiver of the restrictive covenant) and by which the Board's financial condition would be improved.[6] There was conflicting evidence about the practicality of any plan for sharing the stadium between two professional football teams.

On 4 October 1965 Hecht received a memorandum from the Interior Department expressing its opinion that the

[6] The Armory Board operated RFK Stadium at a net loss before depreciation in each year from 1966 to 1974. Transcript (Tr.) 721-24, App. 110-27.

restrictive covenant in the Redskins' lease violated the antitrust laws. Hecht distributed copies of this memorandum to the AFL owners and to the Armory Board. Months of intermittent and frustrating meetings followed. The Redskins presented evidence which tended to show that they had reason to doubt the sufficiency of Hecht's financial resources and the integrity with which he pursued the negotiations. During this period, Hecht was whipsawed between the positions of the Redskins and the AFL. The Redskins would not seriously negotiate for Hecht's use of the stadium unless Hecht had an AFL franchise; the AFL would not seriously consider Hecht's application for a franchise unless he had the use of RFK stadium. In his quandary, Hecht made representations to both sides which were optimistic at best. In August 1966 the Redskins broke off negotiations. In October 1966 Hecht filed his original complaint in this action.

II. Overall Analysis

At the outset, the Redskins contend that we need not reach Hecht's various assignments of error because the trial conclusively demonstrated that Hecht lacks standing to sue. Section 4 of the Clayton Act confers the right to sue for treble damages on "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[7] This section establishes a two-fold standing requirement: the plaintiff must show both an *injury-in-fact* to his "business or property" and a *causal connection* between that injury and the defendant's allegedly illegal acts.[8] The Redskins contend that Hecht has shown neither.

First, they argue that Hecht's promotional group had a shifting and impermanent structure; that no money had

[7] 15 U.S.C. § 15 (1970).

[8] *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 810-13 (1977).

been contributed or even committed by its members; that Hecht had no prospect of ever receiving a franchise; that Hecht failed to negotiate toward a franchise in a serious and businesslike manner; and that Hecht consequently lacked "business or property" for antitrust purposes. As will be pointed out more fully below,[9] however, the courts have generally not insisted that a plaintiff actually be engaged in a going business in order to have antitrust standing; it is sufficient if he has manifested an intention to enter the business and has demonstrated his preparedness to do so.[10] Our review of the record indicates that the evidence presented a question of fact for the jury on these issues. We cannot hold that Hecht lacked "business or property" as a matter of law.

Second, the Redskins argue that Hecht's inability to submit an acceptable franchise application was due entirely to his own bad faith in negotiating with them for use of RFK Stadium, and that Hecht consequently failed to show a causal connection between his injury and the restrictive covenant in the Redskins' lease. We find this argument sanctimonious and somewhat sophistical. The negotiations, plainly, were frustrating for all concerned. The question, in any event, was peculiarly one for the jury.[11] We cannot hold, in defiance of plain evidence

[9] *See* pp. 21-22 *infra*.

[10] *See Martin v. Phillips Petrol. Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

[11] Indeed, the jury could have found that bad faith might more properly be attributed to the Redskins. Their protestations that they would have been only too happy to negotiate seriously with Hecht once he had a franchise ring hollow, for they knew full well that Hecht could not get a franchise until he had access to the stadium. There was certainly no willingness to negotiate any arrangement *conditioned on* Hecht's getting the AFL franchise; this might well have been all Hecht needed to obtain it. If the Redskins were as sure as they

and common sense, that the restrictive covenant was causally unrelated to the injury of which Hecht complains; the degree of causality may be another matter.

Having disposed of the Redskins' threshold contentions, we consider plaintiffs' various assignments of error.

III. Instructions

A. *Relevant Geographic Market.*

In suits brought under the Sherman Act the threatened foreclosure of competition must be assessed "in relation to the market affected." [12] The relevant product market in this case is indisputably the business of professional football. The parties disagree, however, as to the relevant geographic market. Hecht contends that it is the metropolitan area of Washington, D.C.; the Redskins contend that it is the entire United States. The trial judge effectively instructed the jury that the relevant geographic market was the nation as a whole.[13] We hold that his instruction was clearly erroneous as a matter of law.

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now assert they were that Hecht and associates could never have obtained a franchise because of lack of financial resources and other reasons, the Redskins could have avoided this lawsuit by waiving their restrictive covenant and then watching the AFL turn down the Hecht application.

[12] *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 321, 327 (1961).

[13] Although the trial judge purported to leave the question of relevant geographical area to the jury, Tr. 2833, he defined that area as the area of competition for football franchises. *See* p. 10 *infra*. Since the trial established beyond peradventure that numerous cities were competing for franchises, the judge's instruction virtually directed the jury to find a national market. Not surprisingly, the jury seems to have been confused by the "relevant market" instructions. *See* Tr. 2851-53.

The relevant geographic market is "the area of effective competition," [14] the area "in which the seller operates, and to which the purchaser can practicably turn for supplies." [15] It is well settled that the relevant market "need not be nationwide," [16] and that "where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area." [17] Indeed, courts have regularly identified relevant geographic markets as single cities or towns, and even portions thereof.[18]

In this case Hecht sought to enter the market for professional football in Washington, D.C. He argues that the Redskins frustrated his entry by denying him use of RFK stadium, access to which was a condition precedent to his submitting a successful franchise application. Given this posture of the case, it seems evident that the relevant geographical market is the D.C. metropolitan area: it is here that "the seller operates;" it is here alone that

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[14] *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 321, 328 (1961).

[15] *Id.*, at 327, *quoted in United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963).

[16] *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 n.5 (1949).

[17] *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 519 (1948).

[18] *E.g., Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953) (relevant market is city of New Orleans); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (relevant market is city of Lorain, Ohio); *Kansas City Star Co.* v. *United States*, 240 F.2d 643 (8th Cir. 1957) (relevant market is Kansas City, Mo.); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) (relevant market is Providence, R.I.); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948) (relevant market is downtown theatre district).

the Redskins' customers (primarily, their ticket purchasers) can "practicably turn" for the supply of professional football. Hecht sought to compete for these customers by obtaining a franchise of his own, and it can scarcely be doubted that "the area of effective competition" between him and the Redskins would be the nation's capital.

The trial court, however, defined the relevant geographical market as "the area of effective competition for the acquisition, location and operation of a professional football franchise in the years 1965 and 1966." [20] It is true, of course, that Hecht had to "compete" with other cities before he could assure himself of a franchise for Washington; yet this is hardly the competition that is at issue here. Hecht is not complaining that the Redskins' restrictive covenant prevented him from entering "the national market for football franchises;" obviously, Hecht could have entered that market, notwithstanding the Redskins' lease, from any other city. Hecht is complaining, rather, that the restrictive covenant on RKF Stadium in Washington, D.C., prevented him from entering the market for professional football in Washington; this is "the area which the alleged restraints affect." [20]

[19] Tr. 2833, 2863.

[20] *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 520 (1948). Defendants' citation of *American Football League* v. *National Football League*, 323 F.2d 124 (4th Cir. 1963), is inapposite. That case concerned the "competition between the leagues for franchise locations;" since each league was considering expansion to a host of desirable sites, the court properly held that the market, geographically, was "as least as broad as the United States, including Hawaii and portions of Canada." 323 F.2d at 130. This case, by contrast, concerns the potential competition between two teams for customers in one location. Unlike the NFL, the Redskins as "sellers" do not operate nationally; unlike the AFL, Hecht is not trying to expand nationally. He sought merely to compete with the Redskins on their home turf.

The "national competition" was but a preliminary, if necessary, step to a distinctly local end. We hold, therefore, that the trial judge erred in failing to instruct the jury that the relevant geographic market is the area of metropolitan Washington, D.C., in which Hecht and the Redskins would have effectively competed for customers.[21]

B. *Monopolistic Intent and "Natural Monopoly."*

The offense of "monopolization" under Sherman Act § 2 implicates both the possession of monopoly power—"monopoly in the concrete" [22]—and an element of willful-

[21] These customers would include potential season ticket holders and occasional ticket buyers, and, to a lesser extent, purchasers of local radio and pre-season television broadcasting rights. Most of a professional football team's broadcasting revenue, of course, derives from the national television contract, which is negotiated by the league. As testimony at trial indicated, however, individual teams have very little control over the revenue they derive from this contract, and thus the most important factor in considering location of a franchise is the potential "gate" in the home city. Tr. (4 Apr. 1975) at 31. For this reason, national television audiences and national television contract revenues should be ignored in ascertaining the relevant market here. *Cf. United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 361 (1963) (holding relevant market to be metropolitan area of Philadelphia, Pa.):

> [In ascertaining the relevant geographic market,] a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest . . . customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered.

See generally P. AREEDA, ANTITRUST ANALYSIS ¶ 231 (2d ed. 1974).

[22] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911).

ness or intent.[23] To demonstrate intent to monopolize, however, a plaintiff need not always prove that the defendant acquired or maintained his monopoly power by means of exclusionary, unfair, or predatory acts. At least since *Alcoa*,[24] it has been clear that the requisite intent can be inferred if a defendant maintains his power by conscious and willful business policies, however legal, that inevitably result in the exclusion or limitation of actual or potential competition.[25] In accordance with *Alcoa*, Hecht requested an instruction that the jury could find monopolistic intent if it found that the Redskins had consciously engaged in acts or contracts, whether lawful or unlawful, that "maintained and protected" their monopoly over professional football in Washington. The trial judge refused to give this instruction. Instead, he ruled that the *Alcoa* theory of intent (*viz.*, an inference of monopolistic intent without a showing of specific unfair practices) was not available to Hecht unless he proved that the Washington metropolitan area could support two professional football teams. We hold that this instruction was error.

In order to explain the trial judge's chain of reasoning, it is necessary to elaborate somewhat the teaching of *Alcoa*. In that opinion, Judge Hand recognized, as

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[23] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *Yoder Bros., Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1366 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

[24] *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Learned Hand, J.).

[25] *Id.* at 428-31. *See, e.g., United States* v. *Griffith*, 334 U.S. 100, 105-08 (1948); *Helix Milling Co.* v. *Terminal Flour Mills Co.*, 523 F.2d 1317, 1321 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *United States* v. *United Shoe Mach. Corp.*, 110 F.Supp. 295, 344-45 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

noted above, that monopolistic intent may be inferred from conscious business practices that inevitably produce or maintain monopoly power. Judge Hand also recognized, of course, that there are situations in which an inference of monopolistic intent absent a showing of specific unfair practices would be improper. One such situation is where defendant has a "natural monopoly"—where, in Judge Hand's words, "[a] market [is] so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand."[26] In the wake of *Alcoa*, accordingly, a substantial body of case law has developed, holding that the "characteristics of a natural monopoly make it inappropriate to apply the usual rule that success in driving competitors from the market is evidence of illegal monopolization."[27] These cases hold, in short, that a natural monopolist does not violate § 2 unless he "acquired or maintained [his] power through the use of means which are 'exclusionary, unfair or predatory.'"[28]

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[26] *United States* v. *Aluminum Co. of America*, 148 F.2d at 430. *See* C. KAYSEN & D. TURNER, ANTITRUST POLICY 191 (1959):

> *Natural monopoly.* In the economic sense, natural monopoly is monopoly resulting from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business.

[27] *Greenville Pub. Co., Inc.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 397 (4th Cir. 1974).

[28] *Ovitron Corp.* v. *General Motors Corp.*, 295 F.Supp. 373, 378 (S.D.N.Y. 1969), *quoting American Football League* v. *National Football League*, 323 F.2d 124, 131 (4th Cir. 1963). *See, e.g., John Wright & Assoc., Inc.* v. *Ullrich*, 328 F.2d 474, 479 (8th Cir. 1964); *Union Leader Corp.* v. *Newspapers of*

In this case, therefore, the trial judge properly told the jury that if it found the Redskins to have a natural monopoly, "such a monopoly does not violate the antitrust laws unless it was acquired or maintained by exclusionary, unfair, or predatory means." [29]

The trial judge further instructed the jury, however, that Hecht bore the burden of proving that the Redskins did *not* have a natural monopoly:[30]

> In this connection, you are instructed that an established operating professional football team may be said to have a natural monopoly in a particular city, if that city cannot support two professional teams under existing circumstances. Accordingly, the plaintiffs must prove by a preponderance of the evidence that [the D.C. metropolitan area,] in 1965 and 1966, could have reasonably supported both the defendant Redskins and an [AFL] team.

This part of the instruction, we think, was incorrect. It is the clear thrust of *Alcoa* that, once a plaintiff has proven the defendant's maintenance of its monopoly power through conscious business practices, a rebuttable presumption is established that defendant has the requisite intent to monopolize. The defendant can defeat this presumption by showing that it had monopoly, as some have greatness, "thrust upon it" [31]—that its power derives from "superior skill, foresight and industry" or (as

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New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 457, 511 (E.D. Pa. 1972); *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F.Supp. 227, 229 (N.D. Tex. 1959).

[29] Tr. 2832, 2862.

[30] Tr. 2832, 2862; *cf.* Tr. 2703-06.

[31] *United States* v. *Aluminum Co. of America*, 148 F.2d at 429.

is particularly relevant here) from the advantages of natural monopoly conditions.[32] Both the Supreme Court, and the lower courts, have echoed this position.[33] We are not called upon in this case to elaborate the various circumstances under which the burden of proof in § 2 cases might shift to defendant; we hold merely that when, as here, a defendant seeks to avoid a charge of monopolization by asserting that it has a natural monopoly owing to the market's inability to support two competitors, the defendant, and not the plaintiff, bears the burden of proof on that score.

This holding finds firm grounding in antitrust policy. To hold otherwise could effectively mean that a defendant is entitled to remain free of competition unless the plaintiff can prove, not only that he would be a viable

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[32] *Id.* at 429-30.

[33] *See United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 392 (1956) ("[T]his Court [has concluded] in prior cases that, when an alleged monopolist has power over price and competition, an intention to monopolize in a proper case may be assumed") (footnote omitted); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 75 (1911); *United States* v. *Grinnell Corp.*, 236 F.Supp. 244, 248 (D.R.I. 1964) (Wyzanski, J.), *aff'd and remanded on the question of relief*, 384 U.S. 563 (1966) ("[O]nce the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2"); *United States* v. *United Shoe Mach. Corp.*, 110 F.Supp. 295, 342, 343-46 (D. Mass. 1953) (Wyzanski, J.), *aff'd per curiam*, 347 U.S. 521 (1954). *But see United States* v. *Grinnell Corp.*, 384 U.S. at 576 n.7 ("Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like").

competitor, but also that he and defendant both would survive. This result would be ironic indeed: we cannot say that it is in the public interest to have the incumbent as its sole theatre, or its sole newspaper, or its sole football team, merely because the incumbent got there first. Assuming that there is no identity of performance, the public has an obvious interest in competition, "even though that competition be an elimination bout." [34] "It has been the law for centuries," Justice Holmes once wrote, "that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his attempt." [35] The newcomer and the incumbent may both succeed, or either or both may fail; this is what competition is all about.

C. *Essential Facility.*

Hecht contends that the District Court erred in failing to give his requested instruction concerning the "essential facility" doctrine. We agree. The essential facility doctrine, also called the "bottleneck principle," states that "where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility." [36] This principle of antitrust law derives from

[34] *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F.2d 582, 584 n.4 (1st Cir. 1960). *See Greenville Pub. Co., Inc.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 397 (4th Cir. 1974).

[35] *Vegelahn* v. *Guntner*, 44 N.E. 1077, 1080, 167 Mass. 92 (1896).

[36] A. D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 67 (2d ed. 1970); *id.* at 66-69, 127-31. *See* L. A. SULLIVAN, ANTITRUST 131 (1977):

> [I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, non-discriminatory terms.

the Supreme Court's 1912 decision in *United States* v. *Terminal R.R. Ass'n*,[37] and was recently reaffirmed in *Otter Tail Power Co.* v. *United States*;[38] the principle has regularly been invoked by the lower courts.[39] To be

[37] 224 U.S. 383 (1912). In *Terminal R.R.*, a group of railroads had won control of all railroad switching facilities in St. Louis; topographical factors prevented potential competitors from gaining access to the city via other routes. The Court held:

> [W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the [Sherman Act].

Id. at 409. The Court ordered the railroads to amend their agreement to provide "for admission of any existing or future railroad to joint ownership and control of the combined terminal properties" on equal terms. *Id.* at 411.

[38] 410 U.S. 366, 377-78 (1973), *affirming in relevant part* 331 F. Supp. 54, 59-61 (D. Minn. 1971). In *Otter Tail*, municipalities sought to compete with defendant power company by building their own electric facilities. The municipalities could not afford to construct their own subtransmission lines, however, and defendant refused to "wheel" power for them over its own lines. The court found that Otter Tail's subtransmission lines were a scarce facility and that its refusal to share them violated § 2. 331 F. Supp. at 61.

[39] *E.g., Helix Milling Co.* v. *Terminal Flour Mills Co.*, 523 F.2d 1317, 1320 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (plaintiff, whose mill had been destroyed by fire, sought to buy defendant's mill; defendant instead sold it to plaintiff's pre-fire competitor; *held*, plaintiff stated a cause of action under § 1: "In a closed market, where the acquisition of existing production facilities is the only economically feasi-

"essential" a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.[40] Necessarily, this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.[41]

In this case Hecht presented evidence that RFK stadium is the only stadium in the D.C. metropolitan area that is suitable for the exhibition of professional football games.[42] He also presented evidence that proper agreements regarding locker facilities, practice sessions, choice of playing dates, and so forth would have made sharing of the stadium practical and convenient.[43] Accordingly, Hecht requested an instruction that if the jury found (1) that use of RFK stadium was essential to the operation of a professional football team in Washington; (2) that

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ble method of entry, an agreement to acquire the only available facilities necessarily excludes a potential entrant."); *United States* v. *Standard Oil Co.*, 362 F. Supp. 1331, 1341 (N.D. Cal. 1972), *aff'd on appeal*, 412 U.S. 924 (1973) (defendant had rights to exclusive use of fuel storage facilities essential to give potential competitors access to airport; *held*, defendant violated § 3 and was "ordered to take all necessary steps so as to enable other suppliers or distributors of petroleum products to use an adequate portion of the . . . storage facilities on a shared cost basis to enable said suppliers or distributors to compete in the Samoan market").

[40] *See Helix Milling*, 523 F.2d at 1320; *Otter Tail*, 331 F. Supp. at 60, 61; A. D. NEALE, *supra* note 36 at 68, 131.

[41] *See Otter Tail*, 410 U.S. at 378, 381; L. A. SULLIVAN, *supra* note 36 at 127-28; A. D NEALE, *supra* note 36 at 131.

[42] Tr. 243-44, 304-05, 1298-99.

[43] Tr. 244-45.

such stadium facilities could not practicably be duplicated by potential competitors; (3) that another team could use RKF stadium in the Redskins' absence without interfering with the Redskins' use; and (4) that the restrictive covenant in the lease prevented equitable sharing of the stadium by potential competitors, then the jury must find the restrictive covenant to constitute a contract in unreasonable restraint of trade, in violation of Sherman Act §§ 1 and 3.[44] This instruction was substantially correct and failure to give it was prejudicial error.[45]

D. *Business or Property.*

Under § 4 of the Clayton Act a plaintiff has standing to complain of an antitrust infraction only if he has been "injured in his business or property" by reason of the

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[44] App. 146. It seems clear that the essential facility doctrine would also support an allegation that the Redskins' refusal to waive the restrictive covenant constituted illegal monopolization under § 2. *See* note 11 *supra*. *Cf. Otter Tail*, *supra* note 38 and *Terminal R.R.*, *supra* note 37. Hecht, however, did not request an instruction to this effect.

[45] Defendants offer two objections to this conclusion. First, they argue that the requested instruction presupposes the area of competition to be restricted to Washington, D.C. In view of our disposition of the relevant market issue, *supra* p. 11, this argument need not detain us further. Second, defendants argue that, notwithstanding the essential facility doctrine, the jury could still have found the restrictive covenant *reasonable*. *See* pp. 24-26 *infra*. This argument robs the essential facility doctrine of any significance, and we reject it. The garden-variety restrictive covenant does not violate § 1 unless it unreasonably restrains trade; when the restrictive covenant covers an essential facility, however, all possible competition is by definition excluded and the restraint is thus unreasonable *per se*—provided, of course, that the facility can be shared practically. The requested instruction adequately accommodated this *proviso*.

defendant's acts.[46] Hecht contends that the trial judge erred in failing to make the disjunctive character of this requirement sufficiently clear to the jury. Although we would not reverse on this point alone, we think Hecht's contention has merit.[47] On remand, the trial judge should take greater care to instruct the jury that it need only find that plaintiffs sustained injury *either* to their business *or* to their property, and that it need not find that they sustained injury to both.

Hecht also contends that the trial court erred in failing to give his requested instructions on the meaning of "business" and "property." We disagree, and hold that the trial judge's instructions on this score were substantially correct.

Hecht argues that "*promotion* of obtaining a professional football franchise" is, without more, "business"

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[46] 15 U.S.C. § 15 (1970).

[47] In the course of a seven-page instruction on the meaning of "business or property," the judge's *only* reference to the "either/or" nature of the statutory requirement was as follows: "Section 4 of the Clayton Act, to which I have referred, uses the words 'injury to business or property.' Thus, business and property are words in the disjunctive." Tr. 2823. Plaintiff requested the judge to amend his instruction: "[W]hen you use the word disjunctive, I would like you to sort of explain that [it means] either one or the other must be injured." Tr. 2684. The judge refused. *Id.* During its deliberations, the jury asked to hear the instruction on "injury to property" again. Plaintiff again asked the judge to make clear to the jury that they had to "find either damage to property or to business." Tr. 2852. The judge again refused. *Id.* The final paragraph of the "property" instruction might be taken to imply that the jury had to find an injury to property if Hecht were to have standing. *See* Tr. 2856. The record suggests no reason for the trial judge's refusal to offer the relatively simple yet important clarification requested.

for purposes of § 4.[48] His experts testified that "promotion" is an important part of business.[49] It is true, of course, that every business must have had a promotional stage, since every business must have started somewhere; and that promotion is important to the mature business, as conception is "important" to the adult. But it does not follow from this that promotion *is* business, at least not for purposes of the antitrust laws. One can be a "promoter" though he be a pauper, a tyro, and a dreamer; it is a question of where the line shall be drawn. Uniformly, the courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate sucess.[50] Put another way, the courts

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[48] Plaintiffs' Revised Instruction No. 17, App. 138-39 (emphasis added); Brief at 30-31.

[49] Tr. (4 Apr. 1975) at 89-90.

[50] *See* L. A. SULLIVAN, *supra* note 36 at 772 ("plans and preparations to enter into a business constitute business or property . . . if they have materialized sufficiently to constitute an asset of reasonably determinate value which might, for example, be bought and sold or taxed, and which is capable of being appraised") (citing cases); ABA, ANTITRUST LAW DEVELOPMENTS 262 (1975) ("injury to an enterprise in the planning stage is equally actionable as injury in the operating stage provided a sufficiently advanced state of preparation for entering a market has been achieved") (citing cases). *Compare Broadcasters, Inc.* v. *Morristown Broadcasting Corp.*, 185 F.Supp. 641 (D. N.J. 1960) (plaintiff applied for FCC license to construct radio station and was allegedly impeded by defendants' conduct; *held*, plaintiff lacked standing because he "entertained nothing more than an expectation" that he would be engaged in business if license were granted) *with Deterjet Corp.* v. *United Aircraft Corp.*, 211 F.Supp. 348 (D. Del. 1962) ("fledgling" corporation had standing where it had facilities to produce new device, including leased building, necessary machines, and arrangements for products).

have held that a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so.[51] Indicia of preparedness include adequate background and experience in the new field, sufficient financial capability to enter it, and the taking of actual and substantial affirmative steps toward entry, "such as the consummation of relevant contracts and procurement of necessary facilities and equipment." [52] The district judge painstakingly explained these factors to the jury,[53] and his instruction correctly stated the law.

Alternatively, Hecht contends that the "negotiation of contracts" constitutes "business" [54] and that the "right to negotiate a lease or a contract constitutes 'property' " [55] under the antitrust laws. Of course, the courts generally have held that a valid and binding contract constitutes "property," injury to which will give a plaintiff standing under § 4.[56] But they have uniformly held that mere

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[51] *E.g., Woods Explor. & Prod. Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1310 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (citing cases); *Martin* v. *Phillips Petrol. Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Denver Petrol. Co.* v. *Shell Oil Co.*, 306 F.Supp. 289, 307-08 (D. Colo. 1969) (citing cases).

[52] *Id.* at 308. *See, e.g., Martin* v. *Phillips Petrol. Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Waldron* v. *British Petrol. Co.*, 231 F.Supp. 72, 81-82 (S.D. N.Y. 1964).

[53] Tr. 2821-23.

[54] Brief at 32, 33.

[55] *Id.* at 34-36; Plaintiffs' Instr. No. 19, App. 141-42.

[56] *See, e.g., E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 184 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Waldron* v. *British Petrol. Co.*, 231 F.Supp. 72, 86-87 (S.D.N.Y. 1964) (citing *North Texas Producers Ass'n* v. *Young*, 308 F.2d 235, 243 (5th Cir. 1962),

negotiations toward contracts are not "business or property" deserving of antitrust protection.[57] *Everyone* has the "right" to negotiate contracts; if, as Hecht contends, "all interests that the law protects" constitute "property" within the meaning of § 4,[58] standing is conferred on all the world. The statutory words cannot so lightly be robbed of meaning. The trial judge's "property" instruc-

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cert. denied, 372 U.S. 929 (1963)). *But see VTR, Inc.* v. *Goodyear Tire & Rubber Co.*, 303 F.Supp. 773, 783 (S.D.N.Y. 1969) (no property interest in contract where benefits subject to termination by unilateral action of other party).

[57] *See, e.g., Peller* v. *International Boxing Club, Inc.*, 227 F.2d 593, 595-96 (7th Cir. 1955) (negotiations toward promotion of professional boxing match, including preliminary financial arrangements, "informal understanding," and conversations with boxers, not business or property under § 4; plaintiff "at most . . . desired to enter the business"); *Brownlee* v. *Malco Theatres, Inc.*, 99 F.Supp. 312, 317 (W.D. Ark. 1951) (failure of plaintiff's negotiations for purchase of theatre "did not injure him in his business or property any more than it may have injured any member of the general public who might have been desirous of buying the property"). *Utah Gas Pipelines Corp.* v. *El Paso Nat. Gas Co.*, 233 F.Supp. 955 (D. Utah 1964), cited by Hecht, is not to the contrary. *Utah Gas* held that a corporation, which had been formed for the purpose of constructing a pipeline and which had "partially implemented its plans to construct, own and operate" the pipeline, *id.* at 957, had "business or property" under § 4 even though it had not yet obtained a certificate of public convenience from the state regulatory commission. The court did not hold that "negotiations for contracts" without more conferred standing under § 4. Nor does *Washington Prof. Basketball Corp.* v. *National Basketball Ass'n*, 147 F.Supp. 154 (S.D.N.Y. 1956), stand for the proposition that mere negotiations confer standing. In that case, which arose on a motion to dismiss, there was a question of fact as to whether a binding contract had been entered into. *Id.* at 155.

[58] Plaintiffs' Instr. No. 19, App. 141-42.

tion, while perhaps subject to some clarification,[59] sufficiently conveyed by examples the substance of what was at issue. The court correctly refused to give the instruction that Hecht requested.

E. *Unreasonable Restraint of Trade.*

Under the rule of *Standard Oil Co.* v. *United States*,[60] § 1 of the Sherman Act condemns only *unreasonable* restraints of trade. The trial judge instructed the jury as to the various factors it should consider in determining whether the Redskins' restrictive covenant was an unreasonable restraint.[61] This instruction was based on Justice Brandeis' oft-quoted language in *Chicago Board of Trade* v. *United States*,[62] and was, as far as it went, correct.

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[59] The judge defined property as "the possession of something that deserves legal protection," Tr. 2823, and told the jury to consider all evidence it regarded as "pertinent to the question of whether the plaintiffs possessed property . . . which deserved legal protection." Tr. 2825. The instruction was somewhat circular, for it assumed that the jury already knew which species of alleged "property" deserved legal protection and which did not.

[60] 221 U.S. 1 (1911).

[61] Tr. 2827-28.

[62] 246 U.S. 231, 238 (1918), *quoted in Continental T.V., Inc.* v. *GTE Sylvania Inc.*, —— U.S. ——, ——, 97 S.Ct. 2549, 2557-58 n.15 (1977):

> To determine [whether a restraint is unreasonable] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Hecht contends, however, that the instruction was incomplete: although the court told the jury what *factors* to consider, it failed to tell them what those factors must *prove*—it failed, in other words, to explain what an unreasonable restraint *was*. Hecht argues that the jury should have been instructed that a restraint is unreasonable if it "has a substantially adverse effect upon competition . . . , that is, [if] it suppresses or prevents competition."[63] This is the standard definition of an "unreasonable" restraint, sanctioned both by *Chicago Board of Trade*[64] and later cases,[65] and the trial judge should have included it in his instruction.

Elaborating the *Chicago Board of Trade* factors, the judge told the jury that in considering whether the restrictive covenant was reasonable they should "consider whether the provision [was] fairly related to business considerations that the Redskins or the Armory Board had to deal with at the time they entered into the lease."[66] The court thus implied that if there existed good business reasons for the restrictive covenant the jury should not find the restraint unreasonable. As Hecht points out, however, it is settled that the "antitrust outcome does not turn merely on the presence of sound business reason or motive" and that the "promotion of self-interest alone does not invoke the rule of rea-

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[63] Plaintiffs' Instr. No. 23A, App. 145.

[64] 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.")

[65] *E.g., United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967) (inquiry in assessing whether restraint is unreasonable is whether "the effect upon competition in the marketplace is substantially adverse").

[66] Tr. 2828.

son to immunize otherwise illegal conduct." [67] The latter part of the judge's instruction was thus misleading and should have been deleted.

F. *Proximate Cause.*

Hecht contends that the trial judge neglected to instruct the jury clearly that the restrictive covenant need not be the *sole* cause of Hecht's failure to obtain a franchise, but merely a proximate cause. However, the judge stated plainly that proximate causation "does not mean that the law seeks and recognizes only one proximate cause of an injury" and that, "[t]o the contrary, several factors . . . may work concurrently as the efficient causes of an injury, and, in such case, each of the participating acts or omissions is regarded in law as a proximate cause." [68] Although the judge might well have incorporated phrases like "substantial factor" and "material contributing cause" into his instruction, as Hecht requested,[69] failure to do so did not make the instruction inadequate, misleading, or incomprehensible.

IV. Evidentiary Rulings

A. *Hecht's Dealings with the Interior Department.*

The trial court excluded from evidence all testimony and documents relating to Hecht's activities in obtaining and using the assistance of the Interior Department in his effort to win a franchise. This testimony con-

[67] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967). This aspect of *Schwinn* was not affected by the Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549 (1977). *Continental* overruled *Schwinn* insofar as *Schwinn* held certain vertical territorial restraints illegal *per se*.

[68] Tr. 2838.

[69] Plaintiffs' Instr. No. 32, App. 149.

cerned Hecht's meetings with the Department staff (including the Secretary); the Department's favorable response to Hecht and its willingness to draft a memorandum in support of his application; the Department's conclusion, expressed in a memorandum of law, that the restrictive covenant in the Redskins' lease was illegal; and the delivery of this memorandum to the AFL owners and the Armory Board. Hecht does not seriously contend that the trial court erred in refusing to admit the memorandum itself into evidence.[70] Hecht does contend, however, that all the Interior Department material other than the Department's legal opinion should have been admitted, including evidence that the "memorandum supported the use of the stadium by two teams." [71] The trial judge refused to admit this material into evidence on the ground that its probative value was outweighed by its prejudicial effect. We hold that this was a proper exercise of his discretion.[72]

Admission of the Interior Department material would have prejudiced the Redakins in two ways. First, as defendants argue, it might well have been impossible to permit Hecht "to adduce before the jury the details of his dealings with Interior without letting the jury know about Interior's legal opinion on the validity of the

[70] Revelation of the Department's legal opinion would have been both highly prejudicial to defendants, Fed. R. Ev. 403, and without value to the jury, Fed. R. Ev. 702. *See* C. McCormick, Evidence 26-27 (2d ed. E. Cleary 1972); J. Wigmore, 7 Evidence § 1952 at 81-82 (1940). Hecht admits in brief that he "has been unable to find any . . . support" for the memorandum's admissibility, Brief at 16, and seemingly agreed at trial that the memorandum should not be admitted. *See* Tr. 1416-17.

[71] Brief at 16.

[72] A trial judge, of course, is accorded great deference in exercising his discretion to exclude prejudicial evidence. *See* J. Weinstein, 1 Evidence ¶ 403[03] at 403-20 (1976).

Redskins' lease." [73] But risk of divulging the Interior Department's conclusion of law is not the only, or even the most serious, source of prejudice here. The mere fact that the Government was cooperating with Hecht and favored his proposal—the fact that the Government was "rooting" for him to win—would have portrayed the Redskins as obstructing the will of the people in pursuit of their own selfish ends.[74] Whose side the Government was on, of course, is of no conceivable relevance to the issues the jury had to decide, and we cannot doubt that disclosure of its partisanship would severely have prejudiced the Redskins' position. The probative value of the Interior Department material, on the other hand, seems slight. Most of the evidence excluded was, by Hecht's admission, circumstantial; [75] and the record contains ample evidence for almost all the propositions which Hecht wished to use the Interior Department material to support.[76] On balance, the judge's decision to exclude the material was well within his discretion.

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[73] Brief at 27.

[74] The Department of the Interior and the Armory Board had a thoroughly practical public interest motive in supporting Hecht's efforts to land an AFL franchise for Washington, *i.e.*, the increased stadium rentals would reduce the persistent stadium operating deficit and save taxpayer money. *See* p. 5 and note 6 *supra*.

[75] *See* Brief at 14-15.

[76] Hecht argues that this material evidenced the seriousness of his promotional activities, the favorable disposition of Commissioner Foss toward his application, and the reason for his three-month delay in submitting a proposal to the Armory Board for use of RFK Stadium. *See* p. 5 *supra*. The record contains a great deal of evidence on the first two issues. The record does not seem to contain any other evidence on the third issue. Although we hold that the trial judge did not abuse his discretion in excluding the Interior Department material, our holding will not bar Hecht from attempting to introduce on retrial some portion of the material for the limited purpose of explaining his delay, provided that this can be done without prejudicing the Redskins by revealing the Department's legal opinion or general support for Hecht. We leave this to the sound discretion of the trial judge on remand.

B. *The Promoters' Percentage Interests.*

The trial judge excluded from evidence all testimony concerning an alleged oral agreement among the promoters dictating their percentage shares in the prospective franchise. This testimony was excluded because Hecht's pretrial narrative statements did not specifically allege such an agreement; the pretrial order said that factual contentions omitted from the narrative statements would be deemed abandoned.[77] The judge declined to amend the order to permit introduction of the testimony, reasoning that amendment was not required "to prevent manifest injustice." [78] We hold that the exclusion of this testimony was error. In so holding, however, we do not consider whether admission of the testimony was mandated under the "manifest injustice" rule. In our view, the pretrial order did not need to be amended, for Hecht's allegations as to the oral agreement were fairly comprised within the factual contentions that his pretrial statement contained.

In that statement, Hecht contended that his promotional group was "financially able" to purchase a franchise,[79] and that the promotion "always had available to it the support of local businessmen who were ready, willing and able to supply the money required. . . ." [80] It

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[77] Defendants'-Appellees' Appendix 148-49.

[78] Under F. R. Civ. P. 16, the pretrial order "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

[79] App. 134.

[80] *Id.* at 135-36.

was clear from the outset that Hecht and his original investors had limited financial resources, and that the financial strength of the promotional group derived largely from the more moneyed investors who came in later. It must be assumed that these "additional investors" [81] would contribute capital only in proportion to their percentage interest in the franchise. In order to show that the group as a whole was "financially able," therefore, Hecht obviously had to show that its financially able members, *i.e.*, the "additional investors," were going to own a large percentage share. This he proposed to do by offering evidence of an oral agreement under which the "additional investors" were to own at least 51% of the franchise, while Hecht would retain only 10%.[82]

We think that evidence of some such agreement was necessarily implicated in Hecht's factual contention that his group was "financially able". Unless the jury was to be expected to assume that the additional investors' motivations were eleemosynary, Hecht could not demonstrate financial ability merely by reciting that they "belonged" to his group; he had to show that they had a controlling stake in it. For this reason, testimony as to the alleged oral agreement was encompassed within Hecht's pretrial narrative statement and there was thus no bar to its admission.[83]

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[81] *Id.* at 135.

[82] The remaining 39% was to be owned by the original investors whom Hecht listed in his June 1965 application for an AFL franchise, prior to his meeting with Commissioner Foss. *See* p. 4 *supra*.

[83] The Redskins argue that the recitals in Hecht's pretrial statement gave them no notice "that plaintiffs were claiming to have advanced their promotion to the point of specific ownership agreements." Brief at 29. Defendants, we think, unduly impugn their deductive powers. In any event, the Redskins will have ample notice of plaintiffs' contentions on retrial.

C. *Expert Testimony.*

The trial judge admitted into evidence testimony of plaintiffs' experts that it was customary and usual business practice for tenants and landlords in the D.C. area to bargain for restrictive covenants in leases. Hecht argues that this testimony was irrelevant and should have been excluded. We agree. The witnesses concededly possessed no expertise about football stadiums, and testified only about garden-variety commercial leases.[84] There is, however, no analogy between a shopping center lease which, *e.g.*, stipulates that only one drug store can rent space in the center, and the restrictive covenant in the Redskins' lease: another drug store can be built down the road, whereas RFK Stadium is an essential facility that cannot be duplicated.[85] It is settled, moreover, that evidence of customs and practices in an industry is irrelevant in determining whether the defendant has violated the antitrust laws.[86] Although we would not reverse on this point alone, we conclude that the trial judge erred in admitting the experts' testimony.

Conclusion

Because the trial judge erred in giving, or failing to give, at least four important instructions to the jury, and in admitting, or failing to admit, at least two important pieces of evidence, the judgment must be reversed and the case remanded for another trial. On remand, we strongly suggest that the trial judge use his discretion to submit the case to the jury on special interrogatories,[87]

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[84] Tr. 2056-58.

[85] *See* pp. 16-19 *supra*.

[86] *E.g., United States* v. *National City Lines, Inc.*, 186 F.2d 562, 572 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951). *See* pp. 25-26 *supra*.

[87] F.R.Civ.P. 49(b).

rather than elicit a mere general verdict. Antitrust cases present difficult problems for jurors; written interrogatories would help them to focus on the salient issues, and would help to pinpoint what went wrong should this case, *horribile dictu*, come to this Court a third time.

So ordered.

APPENDIX D

STATUTES

SHERMAN ACT

§ 1, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy [hereby] declared . . . to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2, 15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 3, 15 U.S.C. § 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any

such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

DISTRICT OF COLUMBIA STADIUM ACT

§ 2, 2 D.C. Code § 1720:

In order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility, the Armory Board (hereinafter referred to as the "Board"), created by section 2-1702, is hereby authorized to construct, maintain, and operate a stadium with a seating capacity of not to exceed fifty thousand, on a site in the District of Columbia determined in accordance with provisions of section 2-1721. In the event the Board exercises the authority vested in it by this section, such stadium shall be constructed substantially in accordance with the plans for such stadium contained in the Praeger-Kavanagh-Waterbury survey entitled "Engineering and Economic Study, District of Columbia Stadium" dated March 31, 1958. The Board is authorized to provide for the construction of such stadium by such means as it determines will most effectively carry out this subchapter (including, but not limited to, a negotiated contract).

§ 3, 2 D.C. Code § 1721:

The Secretary of the Interior is authorized and directed to acquire by gift, purchase, condemnation, or otherwise, all real property within the boundaries of the East Capitol Street site, as established in the first paragraph under the heading "(2) East Capitol Street Site" contained in the National Capital Planning Commission report entitled "Preliminary Report on Sites for National Memorial Stadium" dated November 8, 1956, and thereafter, acting under authority of the Act entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916, as amended (16 U.S.C. § 1 and the following), the Secretary of the Interior shall enter into a contract with the Board for the construction, maintenance, and operation of the stadium (including the operation and maintenance of motor-vehicle parking areas) on such East Capitol Street site, except that such contract may be for a term of not more than thirty years. The Secretary of the Interior is authorized and directed to construct and prepare in areas A, C, D, and E only, on such site, as such areas are indicated on National Capital Parks Map numbered 1.7-146, motor vehicle parking areas, including driveways, walks, lighting, and landscaping, at a total cost not to exceed $2,660,000.

§ 5, 2 D.C. Code § 1723:

In order to carry out the purposes of this subchapter, the Board is hereby authorized without regard to any other provision of law, but subject to any contract entered into with the Secretary of the Interior under section 2-1721—

(1) to determine all questions concerning the use of the stadium for the purposes of this subchapter;

(2) to enter into contracts and agreements with the District of Columbia and the Federal departments, bureaus, establishments, and offices, and the Act of March 4, 1915, as amended (31 U.S.C. § 686), is hereby made applicable to such contracts;

(3) to acquire by purchase or lease, equipment, appliances, facilities, and property of any kind necessary or desirable to carry out the purposes of this subchapter, and to sell or dispose of any such property so acquired when in its judgment it shall be advantageous to do so, except that no contract for more than $3,000 shall be entered into for the purpose of this paragraph without competitive bidding;

(4) to make such structural and other changes in the stadium as it may deem necessary or desirable for carrying out the purposes of this subchapter;

(5) to light, operate and maintain motor-vehicle parking lots;

(6) to operate or contract for the operation of such concessions, including the checking of clothing and the sale of beverages and food as the Board may deem appropriate to the purposes for which the stadium may be rented or leased;

(7) to furnish such services to renters, lessees, and other occupants of the stadium as in its judgment are necessary or suitable for carrying out the purposes of this subchapter;

(8) to rent or lease from to time for any of the purposes of this subchapter, all or any part or parts of the stadium including any or all structures, equipment, or facilities of the stadium, at such rental values and for such periods of time as the Board shall determine;

(9) to carry public-liability insurance protecting the Board, and the members, officers, and employees thereof engaged in operating and maintaining the stadium, and in operating and maintaining the motor-vehicle parking areas in connection therewith; and to require tenants or lessees of the stadium to carry public-liability insurance protecting the interests of such tenants or lessees;

(10) to accept the gratuitous services of such persons as may volunteer to aid in the conduct of its activities.

(11) to enter into contracts, contingent or otherwise, for expert, professional, and other personal services, and for printing, engraving, supplies, or any items or services necessary and incident to the preparation and sale of bonds, to be paid out of the proceeds of the sale of such bonds.